92-399

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LINDO & MADURO, S.A. *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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September 1992

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QUESTIONS PRESENTED

The Hague Convention of 1907 (IV) *Respecting the Laws and Customs of War on Land*, Annexed Regulations, to which the United States is a party, requires an occupying military force to "take all the measures in [its] power to restore and ensure, as far as possible, public order and safety". The questions presented are:

1. Does the doctrine of sovereign immunity shield the United States from its obligations under the Convention?

2. Do the obligations under the Convention include responsibility to civilians who suffer property damage because of a government's failure to comply with the Convention's commands?

LIST OF PARTIES

The parties to the proceedings below were:

In United States Court of Appeals for the District of Columbia Circuit No. 91-5156:

Lindo & Maduro, S.A. - appellant
United States - appellee

In United States Court of Appeals for the District of Columbia Circuit No. 91-5161

Cia. Panameña de Aceites, S.A. - appellant
Epsilon, S.A. - appellant
Distribuidora el Chorro, S.A. - appellant
Distribuidora Gatun, S.A. - appellant
Administradora de Industrias y Comercio, S.A. - appellant
Distribuidora Las Mendozas, S.A. - appellant
Distribuidora Premier, S.A. - appellant
Torneria Especializada, S.A. - appellant
United States - appellee

In United States Court of Appeals for the District of Columbia Circuit No. 91-5162:

Terminales Panama, S.A. - appellant
United States - appellee

In United States Court of Appeals for the District of Columbia Circuit No. 91-5163:

Ricardo Perez, S.A. - appellant
Dynamos Corporation, S.A. - appellant
Corporation Financiera De Equipo, S.A. - appellant
Toyota Rent A Car, S.A. - appellant
Panama Bond Corporation, S.A. - appellant
Hot Shop, S.A. - appellant

United States - appellee

In United States Court of Appeals for the District of Columbia Circuit No. 91-5164:

Diacor, S.A. - appellant
Cemali, S.A. - appellant
Cala, S.A. - appellant
Espanola, S.A. - appellant
Amelia, S.A. - appellant
Medic, S.A. - appellant
Cesar Arrocha Graell & co., S.A. - appellant
Productos Superiores, S.A. - appellant
Abernathy, S.A. - appellant
Clamps, S.A. - appellant
Supro Mundial, S.A. - appellant
Vulcapan, S.A. - appellant
United States - appellee

In United States Court of Appeals for the District of Columbia Circuit No. 91-5165:

Cencal, S.A. - appellant
Super Colmar, S.A. - appellant
Super Mercado Monte Oscuro, S.A. - appellant
Super Deposito, S.A. - appellant
Meso, S.A. - appellant
Super Dorado, S.A. - appellant
Importadora Ricamar, S.A. - appellant
Panaderia y Dulceria Ba Sabrosita 99, S.A. - appellant
Orosi, S.A. - appellant
Granos Del Nilo, S.A. - appellant
Super Centro Juan Diaz, S.A. - appellant
Parmacia Mejor Salud, S.A. - appellant
Parmacia Mejor Salud #1, S.A. - appellant
Parmacia Mejor Salud #3, S.A. - appellant

H. Tzanetatos, Inc. - appellant
Proveedora Universal, S.A. - appellant
Inmobiliaria La Rivera, S.A. - appellant
Lavery Panama, S.A. - appellant
Blue Ribbon Products, S.A. - appellant
Inmobiliaria Argo, S.A. - appellant
United States - appellee

In United States Court of Appeals for the District of Columbia Circuit No. 91-5169:

Rodelag, S.A. - appellant
Rodelag Lacal, S.A. - appellant
Rodelag Otros, S.A. - appellant
Oficina Universal, S.A. - appellant
Llantas, S.A. - appellant
Rodelag David, S.A. - appellant
Gerencia Y Administracion De Computo, S.A. - appellant
Gerencia Y Administracion - appellant
Gerencia Y Administracion - appellant
Centro De Distribucion, S.A. - appellant
Servicios Agroquimicos, S.A. - appellant
Central Agricola, S.A. - appellant
United States - appellee

To the best of petitioners' knowledge, there are no parent or subsidiary relationships requiring disclosure under Rule 29.1 of this Court's rules.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No.

LINDO & MADURO, S.A. *et al.*

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 9, 1992 in Case Nos. 91-5156, 91-5161, 91-5162, 91-5163, 91-5164, 91-5165 and 91-5169.

OPINIONS BELOW

The Court of Appeals' disposition was by unpublished order. However, the Court of Appeals' order adopted the reasoning contained in *Industria Panificadora, S.A. v. United States,* 957 F.2d 886 (D.C. Cir. 1992) (per curiam) *reh'g denied* No. 91-5147 (D.C. Cir. April 15, 1992). Both documents are reprinted in the appendix hereto pp. A1-A5, *infra.*

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 9, 1992. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

TREATY PROVISIONS INVOLVED

Hague Convention of 1907 (IV) *Respecting the Laws and Customs of War on Land*, Annexed Regulations, 36 Stat. 2277:

Article 3. A belligerent party which violates the provisions of said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Article 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

SUMMARY

This case raises the important question of whether the United States may invoke the doctrine of sovereign immunity to shield itself from liability under

a treaty which it ratified and to which it remains a party. The Court of Appeals ruled below that the United States could not be held liable for civilian property damage inflicted by looters who, in the aftermath of the U.S.'s Operation Just Cause in December, 1989, ran rampant in Panama because the U.S. forces there did not promptly restore public order. In so ruling, the court concluded that Article 43 of the Convention's annexed regulations imposed no real constraints on the conduct of the U.S. forces that occupied Panama. As petitioners discuss below, this ruling raises questions of world-wide importance concerning whether this nation or, indeed, any nation can so easily relieve itself of an international law obligation it has undertaken to enforce.[1]

STATEMENT OF THE CASE

A. Background

This petition—and petitioners' underlying District Court actions—grow out of Operation Just Cause, the U.S. invasion of Panama that began on December 19, 1989. Petitioners all own and operate businesses in Panama. They seek recovery, pursuant to the Federal Tort Claims Act (FTCA), of economic losses they suffered as a result of looting that followed the invasion and that occurred primarily because the U.S. forces there at the time did not take immediate steps "to restore and ensure . . . public order and safety".[2]

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[1] Petitioners understand that the Government of Panama will shortly be filing an *amicus* brief in support of the granting of certiorari in these cases and the related cases in No. 92-76, *Industria Panificadora, S.A., et al. v. United States.*

[2] Claims "arising in a foreign country" are generally not cog-

One of the invasion's principal objectives was to neutralize the Panama Defense Forces (PDF), a military force believed to be personally loyal to General Manuel Noriega and under General Noriega's control. In addition to functioning as a military force, the PDF was also Panama's exclusive internal police force, a fact then well known to the United States. Petitioners alleged below—and the U.S. Government has not disputed—that no provision was made during the planning stage or thereafter for the prompt restoration and maintenance of civil order in Panama following the PDF's neutralization.

By late morning on December 20, 1989, U.S. forces had, in fact, fully succeeded in displacing the PDF.

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nizable under the FTCA. *See* 28 U.S.C. §2680(k). However, this so-called foreign country exception is not an exclusion of all liability for injury abroad. For cases brought under the FTCA, the place where actionable conduct occurs is distinguished from the place where the conduct had its operative effect. A claim arises in the United States—and is not barred by the foreign country exception—if the actionable conduct occurs in the United States, notwithstanding that the injury is sustained in a foreign country. *Sami v. United States*, 617 F.2d 755 (D.C.Cir. 1979); *Leaf v. United States*, 588 F.2d 733 (9th Cir. 1978) (claim relating to airplane crash in Mexico connected with D.E.A. operation mounted in the U.S.); *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 737 (C.D. Cal. 1975) (airplane crash in Paris but where airplane was designed and manufactured in the United States); *Glickman v. United States*, 626 F. Supp. 171 (S.D.N.Y. 1985) (claim based on administration of drug to U.S. citizen in France, but where program based in U.S.) *See* also *Richards v. United States*, 369 U.S. 1 (1962) (first establishing the operative conduct methodology for FTCA). For purposes of this petition, the United States did not dispute in the court below petitioners' allegation that the operative conduct occurred in Washington, D.C. where the decision was reached to invade but no decision was reached to promptly restore civil order and safety.

Thereafter, groups of civilians, unrestrained by any indigenous police force, broke into and looted petitioners' various shops, warehouses, factories, restaurants, offices and other commercial facilities. The disorder continued for approximately one week—in some instances in the presence of U.S. military personnel who lacked any orders to intervene.

Petitioners maintain that their injuries were proximately caused by the failure of the United States, in violation of the Hague Convention (IV), 1907, *Respecting the Laws and Customs of War on Land*, 36 Stat. 2277 (the "Hague Convention"), to provide for the restoration and maintenance of civil order immediately following the invasion. Article 43 of the Convention's regulations, which were and remain in force between the United States and Panama as well as among 41 other nations, provides:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter *shall take* all the measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country (emphasis added).

Petitioners alleged in the District Court that the U.S. Government breached its obligations under the Hague Convention by failing to provide for the maintenance of civil order after the PDF was displaced—with the result that prolonged looting and other civil disorder broke out in Panama.

B. District Court Proceedings

By orders entered April 30, 1991, the District Court granted the U.S. Government's motions to dismiss

petitioners' complaints. *See* appendix hereto pp. A10-A32, *infra*. In so ruling, the court accepted the U.S. Government's contention that its failure to maintain order following the elimination of the PDF resulted from a decision shielded from liability under the FTCA's so-called discretionary function exception. *See* 26 U.S.C. 2680(a).[3]

The District Court failed to address petitioners' contention that the Hague Convention was applicable to the U.S. invasion of Panama. Petitioners argued below that the Convention was applicable because, following the invasion, the U.S. became an occupying power in Panama within the meaning of Article 42 of the Annexed Regulations to the Hague Convention. Article 42 provides that "territory is considered occupied when it is actually placed under the authority of the hostile army". The U.S. Government denied that it became an occupying power. Similarly unaddressed by the District Court was petitioners' related contention that, once the U.S. became an occupying power in Panama, the Hague Convention applied and imposed on the U.S. Government a specific, binding, legal obligation to restore and maintain order within Panama.

C. Court of Appeals Proceedings

1. While the cases were pending before the Court of Appeals, the Government of Panama submitted two Diplomatic Notes to the Government of the United States concerning the litigation. Appendix, pp. A40-A49, *infra* (official translations included). The first

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[3] Title 28 U.S.C. 2680(a) provides an exception from FTCA liability if disputed conduct is within a government employee's "discretionary function or duty".

Note was presented on August 19, 1991. It urged the United States to "carefully consider the reasons which motivated the filing of the lawsuits, such being to assure that those who suffered the destruction of their property may obtain just and equitable compensation". *Id.*, p. 42.

The second Note was presented on January 21, 1992. It was issued in response to a position taken by the United States in related litigation in the District Court for the Eastern District of Virginia.[4] The United States there contended that, in order for movants' claims to be cognizable in U.S. courts, the Government of Panama must itself request judicial enforcement of the Hague Convention. The second Note expressly requested such judicial enforcement. Appendix, pp. A48, *infra*.

2. The Court of Appeals summarily affirmed the District Court's dismissal.[5] Like the District Court, the Court of Appeals expressly avoided deciding

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[4] United States District Court for the Eastern District of Virginia No. CA-91-725-A, *Goldstar (Panama), S.A. v. United States*. None of the petitioners were parties to the proceeding in the Eastern District of Virginia; petitioners were *amici curiae* when the District Court's dismissal of the action was appealed to the United States Court of Appeals for the Fourth Circuit.

[5] In an opinion issued March 6, 1992, the Court of Appeals summarily affirmed the District Court's dismissal of case No. 91-5147, *Industria Panificadora, S.A., et al. v. United States* (A petition for writ of certiorari has been filed in *Industria Panificadora* and is pending in No. 92-76). At the same time, the court directed petitioners to show cause why their related appeals should not be summarily affirmed. The Court of Appeals' order concluding the show cause procedure constitutes the judgment in petitioners' cases, since, as noted, the Court of Appeals adopted the reasoning contained in *Industria Panificadora*.

whether the Convention was applicable to the conditions in Panama following the invasion and the displacement of the PDF. In its *per curiam* decision, the court found that, in any event, Article 43 was not sufficiently specific to prescribe a particular course of conduct for the U.S. forces in Panama. Appendix, pp. A4-A5, *infra*. Without explaining its reasoning, the court also ruled that the Diplomatic Notes had become moot. As a result, neither Note was considered on the merits.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Permits a Nation to Shield Itself from Any Responsibility or Liability Under Article 43 Even Though Damages Ensue As A Direct Result of the Manner in Which That Nation's Forces Occupy Another Nation's Territory

With the end of the two superpower-imposed international order, the world is entering a period where it will become increasingly common for one nation's armed forces to be stationed on and to occupy territory of another. This already has occurred in Croatia, Bosnia-Hercegovina, Kuwait and Israel—as well as in Panama, following the 1989 invasion. It will certainly occur again, given the many areas of geopolitical instability and ethnic flashpoints around the world. The Hague Convention is the principal source of law defining an occupying power's duties and obligations to the indigenous population.

The decision below is the first time in decades that a U.S. court has given substantive consideration to Article 43. Although the decision pertained only to U.S. troops in Panama, it interprets a treaty provision that every one of the member states party to that

treaty has promised to enforce. If the decision below were allowed to stand, it would surely emasculate the purpose of this significant treaty provision and thus create a disturbing and dangerous precedent of worldwide applicability.

The Court of Appeals determined that the United States, through the FTCA, can effectively shield itself from Article 43 civil liability for its conduct of a military occupation on foreign territory. Given this precedent, it would be virtually impossible for the United States to take any principled position or action in opposition to any other nation that seeks to create a similar shield against its obligations under Article 43. Permitting every Hague Convention party effectively to elect whether or not to be bound by Article 43 will inevitably gut the Article of all meaning and purpose.

This would be a most unfortunate result in a world that today needs to *increase*, not decrease, the accountability of armed occupation forces for their conduct on another nation's territory. It would be an especially unfortunate result coming from a court of the United States which, perhaps more than any other nation, has historically attempted to guide and govern the conduct of its armed forces, and the armed forces of other nations, to conform with the requirements of international law. See, e.g., *In Matter of Yamashita*, 327 U.S. 1 (1946). Because the decision below involves a fundamental provision of one of the more widely recognized instruments of international law, it will be studied by jurists and lawyers throughout the world. A decision of such global import deserves Supreme Court review.

II. The Decision Below Departs from the Approach Traditionally Employed by This and Other Federal Courts to Determine Whether a Government is Immune from Obligations Imposed by International Law

The Court of Appeals concluded that, whether or not Operation Just Cause and its aftermath were subject to Article 43, the discretionary function exception would bar recovery because Article 43 "prescribes no specific course of conduct that the government must follow to avoid tort liability" Appendix, pp. A4-A5, *infra*. In reaching this conclusion in its two-page decision, the court failed to consider any aspect of Article 43—for example, how the same and similar provisions have been applied by other tribunals; how the contracting parties have, in actual practice, implemented the language; and how the contracting parties themselves interpret the language. The court's dismissive approach to this nation's treaty obligations should not be allowed to go unreviewed.

1. The D.C. Circuit's approach failed to consider the uniquely important issue of the relationship between this nations's obligations under the treaty and its consent to be sued. This precise issue can and will regularly arise whenever a *foreign* Government raises sovereign immunity in defense to a suit by U.S. nationals alleging treaty violations. The usual and, we submit, far better practice is to closely analyze the international law obligation as another potential source of governmental liability.

Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia, 729 F.2d 422 (6th Cir.1984), for example, was an appeal from a District Court ruling that the Act of State Doctrine

precluded judicial inquiry into the Ethiopian Government's expropriation of a U.S. corporation's ownership interest in an Ethiopian business.[6] Plaintiff's claim was based on a provision in the Treaty of Amity between the United States and Ethiopia requiring each signatory to make "prompt payment of just and effective compensation" if property of one signatory's nationals was expropriated by the other signatory (Under *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), the Act of State Doctrine does not generally provide a defense from suit in the United States where there is "a treaty or other unambiguous agreement regarding controlling legal principles").

The District Court could not find a mandatory duty in the "prompt payment" clause. It viewed the clause—in an approach strikingly similar to the D.C. Circuit's here—as "so inherently general, doubtful and susceptible to multiple interpretation" as to be unusable as a rule for deciding a concrete case. 729 F.2d at 424. The Sixth Circuit reversed and found that the "prompt payment" language did indeed impose a mandatory duty on Ethiopia. The District Court erred, wrote the Sixth Circuit, because it looked only at the language of the treaty and failed to consider whether the "prompt payment of just and effective compensation" language had an established meaning in international law. The Sixth Circuit concluded that the language in fact had an established international law meaning sufficiently precise to provide a legal

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[6] The Act of State Doctrine holds that U.S. courts will not sit in judgment on the acts of a foreign government performed in the foreign government's territory.

standard for the plaintiff's expropriation claim against Ethiopia.[7]

The court below followed the erroneous approach rejected in *Kalamazoo Spice:* it refused to consider whether a nation's treaty obligations can limit its sovereign immunity. As in *Kalamazoo Spice* in the district court, the court below in the instant case undertook only the most cursory analysis of the governing international agreement and then proceeded to uphold the claim of immunity. As the Sixth Circuit's opinion demonstrates, however, international law obligations should not be so cavalierly dismissed.[8]

2. The Court of Appeals also deviated from established principles in refusing to consider the contracting parties' own practice in implementing Article 43. This Court recently emphasized the importance of the parties' own treaty implementation measures:

> In determining whether the Executive Branch's domestic implementation of the Convention is

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[7] *See* also *American International Group, Inc. v. Islamic Republic of Iran,* 493 F.Supp. 522 (D.D.C. 1980) modified on other grounds, 657 F.2d 430 (D.C.Cir.1981) (permitting claims for expropriation of U.S. insurance interests by the Government of Iran based on 1957 Treaty of Amity with U.S.); *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1540-41 (D.C.Cir. 1984) (en banc) (stating in dicta that treaty exception to Act of State Doctrine may apply), vacated on other grounds, 471 U.S. 1113 (1985); *Callejo v. Bancomer, S.A.,* 764 F.2d 1101 (5th Cir. 1985) (recognizing the treaty exception but declining to apply it to the International Monetary Fund's Articles of Agreement).

[8] In the District Court, petitioners submitted an affidavit from Theodor Meron, Professor of Law at New York University Law School. Professor Meron's affidavit discusses at length the specific contours of an occupying power's responsibility to restore civil order in occupied territory.

> consistent with the Convention's terms, our task is to construe a "contract" among nations. The conduct of the contracting parties in implementing that contract in the first 50 years of its operation cannot be ignored.

Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243 (1984).

Article 43 has been expressly incorporated into the standing orders for the U.S. Army. See Section 363 of the U.S. Army Field Manual FM27-10, *The Law of Land Warfare*. Section 363 adopts the language of Article 43 verbatim. The Field Manual notes that its purpose is to provide "authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land". *Id.* 1. On the merits, it is difficult to reconcile the U.S. Army's own view of Article 43 as "authoritative" with the Court of Appeals' conclusion that Article 43 is too vague to be a guide for the conduct of U.S. forces in the field. But it is even more difficult to comprehend the Court of Appeals' attempt to reach that conclusion without even considering the Field Manual.

3. The Court of Appeals deviated from normal procedure in still another respect: by failing to consider Panama's two Diplomatic Notes. While an appellate court generally limits itself to the trial court record, in another case involving a treaty between the United States and Panama, the Federal Circuit Court of Appeals, on the very eve of oral argument, accepted a Diplomatic Note submitted by the Government of Panama that supported the position of the United States in the litigation. See, *Coplin v. U.S.*, 761 F.2d 688 (Fed. Cir. 1985), aff'd, 479 U.S. 27 (1986). In

the instant case, the court refused to accept two Notes submitted by the Government of Panama that did not support the position of the United States. If these Notes had been accepted, they would have surely led the court to consider the Hague Convention on its merits and with the knowledge that the Government of Panama supported the claims of its nationals under the Convention. A grant of certiorari would provide the first opportunity for a U.S. Court to take cognizance of the views of the Government of Panama in this litigation.

4. The District of Columbia Circuit has created a facile but troublesome precedent. The precedent is facile because it suggests that determining whether a treaty creates a duty enforceable under U.S. domestic law entails no more than a cursory reading of the treaty. The precedent is troublesome because it could be employed in the future not just by the United States but by all other governments to resist enforcing *their* treaty responsibilities—merely by concluding, without more, that the treaty's language is not sufficiently detailed to require "a specific course of conduct". The end result would be future precedents that are inimical to the recognition and proper enforcement of treaty obligations throughout the world.

CONCLUSION

It is a fundamental tenet of international law that a state may not shield itself from its duty to provide remedies for the breach of treaty and other obligations under international law. See, *Restatement (Third) Of Foreign Relations Law* §*901*. But it is virtually impossible to reconcile Article 43's directive that a state party to the Treaty must take "all the measures

in [its] power to restore, and ensure, as far as possible, public order and safety" in occupied territory with the Court of Appeals' view that the U.S. retains limitless discretion in its civil administration of occupied territory.

The United States may not so easily relieve itself of its treaty obligations, especially those which, as here, cover such a critically important area of nation-state activity—today as well as in the future. An attempt to do so, based on nothing more than the discretionary function exception, would be totally at odds with the historically accepted principle that treaty law "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana,* 175 U.S. 677, 700 (1900). *See* also *Filartiga v. Pena-Irala,* 630 F.2d 876, 886 (2d Cir. 1980) ("The law of nations forms an integral part of the common law . . ."); Vázquez, *Treaty-Based Rights and Remedies of Individuals,* 92 Columbia L.Rev. 1082 (1992)

This nation's treaty obligations are today expanding exponentially in number and significance; trans-national economic, political and military contacts are burgeoning; and the presence of decisive international law issues in domestic litigation is increasingly common. This case presents an opportunity for the Court to reaffirm its interest in assuring proper interpretation of an important treaty with global application.

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should be granted.

Respectfully submitted,

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September 1992

APPENDIX

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5139

September Term, 1991
91cv00118
FILED JUN 09 1992

Distribuidora Comercial Vicky, S.A., *et al.*,

Appellants

v.

United States of America

And Consolidated Cases

BEFORE: Wald, Edwards and Williams, Circuit Judges

ORDER

Upon consideration of the court's order to show cause, filed March 6, 1992, the response thereto and the reply, the motion to include diplomatic notes in the record, the opposition thereto, and the motions for leave to submit a second diplomatic note and the oppositions thereto, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED that the district court's April 30, 1991 orders dismissing these actions be summarily affirmed for the reasons stated in this court's opinion in *Industria Panificadora, S.A. v. United States*, 957 F.2d 886 (D.C. Cir. 1992) (per curiam), *reh'g denied*, No. 91-5147 (D.C. Cir. Apr. 15, 1992). The merits of the parties' positions are so clear as to justify summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). It is

FURTHER ORDERED that the motions to submit diplomatic notes be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam

INDUSTRIA PANIFICADORA, S.A., et al., Appellants

v.

UNITED STATES of America, Appellee,

Lindo Marduro, S.A., et al., Intervenors

No. 91-5147.

United States Court of Appeals,
District of Columbia Circuit.

March 6, 1992.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 90-01694)

Douglas B. McFadden and James A. Kline, Washington, D.C., for appellants.

Jay B. Stephens, U.S. Atty., John D. Bates, R. Craig Lawrence, and Thomas S. Rees, Asst. U.S. Attys., Washington, D.C., for appellee.

Allan I. Mendelsohn and Marvin L. Szymkowicz, Washington, D.C., for intervenors.

Before MIKVA, Chief Judge, and RUTH BADER GINSBURG and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed PER CURIAM.

ON MOTION FOR SUMMARY AFFIRMANCE

PER CURIAM:

Appellants, Panamanian business enterprises, allege that they suffered property damage during looting that occurred in the wake of the invasion of Panama by United States armed forces in December 1989. In 1990, after exhausting their administrative remedies, appellants brought this action in the United States District Court for the District of Columbia under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 *et seq.*, and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. The complaint charges that appellants' losses were caused by the negligence of U.S. officials who failed to provide adequate police protection during and after the

invasion. The district court dismissed the action, holding that the challenged decisions and conduct fell within the "discretionary function" exception to the FTCA, and that the ATCA did not provide an independent waiver of sovereign immunity. Alternatively, the district court ruled that the action presented a nonjusticiable political question. *See Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154 (D.D.C. 1991). The district court, we hold, correctly applied the FTCA's discretionary function exception. We affirm the district court's order on that ground, and express no opinion on that court's alternative, "political question" rationale.

The discretionary function exception, 28 U.S.C. § 2680(a), shields from tort liability discretionary governmental decisions and actions grounded on considerations of social, economic or political policy, whether at the "planning" or "operational" level. *See United States v. Gaubert*, 111 S. Ct. 1267, 1273-75 (1991); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813-14 (1984). The district court correctly concluded, *see* 763 F. Supp. at 1156-59, that the decisions appellants question concern allocation of military and law enforcement resources, and are therefore sheltered by the exception. *Cf. Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1198 (D.C. Cir. 1986) (decisions by federal officials deploying personnel in response to a hostage situation); *Monarch Ins. Co. v. District of Columbia*, 353 F. Supp. 1249, 1256-59 (D.D.C. 1973) (planning and execution of riot control activities by the National Guard), *aff'd*, 497 F.2d 684 (D.C. Cir.) (table), *cert. denied*, 419 U.S. 1021 (1974).

Appellants assert that the United States was under a mandatory duty to provide police protection, imposed by Article 43 of the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.* Even if Article 43 applied to U.S. forces in Panama, however, the discretionary function exception would bar recovery, for Article 43 prescribes no specific course of conduct that the government must follow to avert tort liability. *Cf. Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (exception does not apply where statute, regulation or policy prescribes a specific course of action); *Allen v. United States*, 816

*Article 43 provides that an occupying authority must "take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety" in the occupied area. 36 Stat. at 2306.

F.2d 1417, 1421 (10th Cir. 1987) (exception applies where statute imposes broad duty, but does not circumscribe discretion in determining how to fulfill that duty), *cert. denied*, 484 U.S. 1004 (1988).

The district court, furthermore, correctly noted that the ATCA itself does not provide a waiver of sovereign immunity. *See* 763 F. Supp. at 1159 n.6. Finally, because the district court properly ruled that the FTCA's discretionary function exception bars appellants' action, we need not and do not decide whether the "political question" doctrine supplies an alternative ground for dismissal of the case. *See* 763 F. Supp. at 1159-61.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5139 — September Term, 1991
FILED March 6, 1992
91cv00118

Distribuidora Comercial Vicky, S.A., *et al.*,
Appellants

v.

United States of America, *et al.*

91-5144 — 90cv03061

Victoria Enterprise S.A., *et al.*,
Appellants

v.

United States of America

91-5145 — 90cv02952

S.A. Rafbar, *et al.*,
Appellants

v.

United States of America

91-5146 — 91cv00887

Centro Marino, S.A., *et al.*,
Appellants

v.

United States of America

91-5147 — 90cv01694

Industria Panificadora, S.A., *et al.*,
Appellants

v.

United States of America

91-5148 91cv00945

Bonmark, S.A., *et al.*,

Appellant

v.

United States of America

91-5149 90cv02756

Vida Panama, S.A., *et al.*,

Appellants

v.

United States of America

91-5150 90cv02266

Panameubles, S.A., *et al.*,

Appellants

v.

United States of America

91-5151 91cv00596

Palacio Musical, S.A., *et al.*,

Appellants

v.

United States of America

91-5156 90cv02589

Lindo Marduro, S.A.,

Appellant

v.

United States of America

91-5161 91cv00495

Cia Panamena de Aceites, S.A., *et al.*,

Appellants

v.

United States of America

91-5162 91cv00925

Terminales Panama, S.A.,

Appellant

v.

United States of America

91-5163 90cv02264

Ricardo Perez, S.A., *et al.*,

Appellants

v.

United States of America

91-5164 90cv02823

Diacor, S.A., *et al.*,

Appellants

v.

United States of America

91-5165 90cv01966

Cencal, S.A., *et al.*,

Appellants

v.

United States of America

91-5169 90cv02281

Rodelag, S.A., *et al.*,

Appellants

v.

United States of America

BEFORE: Mikva, Chief Judge; Ruth B. Ginsburg and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance in No. 91-5147, the responses thereto and the reply; the motion to supplement the record and the opposition thereto; the motion for

leave to submit a diplomatic note, the opposition thereto and the reply; and this court's order filed August 16, 1991, it is

ORDERED that the motion for summary affirmance be granted for the reasons stated in the *per curiam* opinion issued this date in No. 91-5147. It is

FURTHER ORDERED that the motion to supplement the record and the motion for leave to file a diplomatic note in No. 91-5147 be dismissed as moot. It is

FURTHER ORDERED, on the court's own motion, that Nos. 91-5139, 91-5144, 91-5145, 91-5146, 91-5148, 91-5149, 91-5150, 91-5151, 91-5156, 91-5161, 91-5162, 91-5163, 91-5164, 91-5165 and 91-5169 be consolidated. All future pleadings should bear the caption of the lead case, No. 91-5139, *Distribuidora Comercial Vicky, S.A., et al. v. United States*. It is

FURTHER ORDERED, on the court's own motion, that appellants in Nos. 91-5139 et al. show cause, within 14 days of the date of this order, why the district court's orders dismissing those cases should not also be summarily affirmed. Appellants are directed to file a joint response. Appellee may file a reply within 21 days of the date of this order.

The Clerk is directed to withhold issuance of the mandate in No. 91-5147 until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15. The Clerk is further directed to file a copy of this order in No. 91-5147 and in Nos. 91-5139 et al. The Clerk is further directed to send a copy of this order to appellants in Nos. 91-5139 et al. both by certified mail, return receipt requested, and by first class mail.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED APR 30 1991

CENCAL, S.A., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 90-1966 SSH
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	

ORDER

On March 14, 1991, the Court stayed this action pending the resolution of defendant's motion to dismiss in *Industria Panificadora, S.A., et al. v. United States*, Civil Action No. 90-1694, the first of seventeen cases before the Court that relate to losses incurred following the initiation of the United States' military operation in Panama in December 1989. Today, pursuant to an Opinion and Order, the Court has granted the United States' motion to dismiss in Civil Action No. 90-1694. Because the above-captioned case presents nearly identical legal issues, it is appropriate that it be dismissed as well. Accordingly, it hereby is

ORDERED, that the stay imposed by the Court on March 14, 1991, is lifted.[1] It hereby further is

ORDERED, that the case is dismissed for the reasons set forth in the Court's Opinion issued today in Civil Action No. 90-1694.

---

[1]On March 19, 1991, plaintiffs filed a motion to lift the stay in this case on the grounds that plaintiffs' counsel represents plaintiffs in five of the stayed cases and wished to have their arguments considered by the Court in addition to the arguments of plaintiffs' counsel in Civil Action No. 90-1694. Although the Court stayed the above-captioned case along with ten others, it did so only as a matter of administrative convenience and only after reviewing the records in all of the related cases. The Court assures the parties that it has considered all arguments made by counsel in all of the cases that were briefed prior to the imposition of the stays.

SO ORDERED.

/s/ Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: APR 30 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED APR 30 1991

RODELAG, S.A., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 90-2281 SSH
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	

ORDER

On March 14, 1991, the Court stayed this action pending the resolution of defendant's motion to dismiss in *Industria Panificadora, S.A., et al. v. United States*, Civil Action No. 90-1694, the first of seventeen cases before the Court that relate to losses incurred following the initiation of the United States' military operation in Panama in December 1989. Today, pursuant to an Opinion and Order, the Court has granted the United States' motion to dismiss in Civil Action No. 90-1694. Because the above-captioned case presents nearly identical legal issues, it is appropriate that it be dismissed as well. Accordingly, it hereby is

ORDERED, that the stay imposed by the Court on March 14, 1991, is lifted. It hereby further is

ORDERED, that the case is dismissed for the reasons set forth in the Court's Opinion issued today in Civil Action No. 90-1694.

SO ORDERED.

/s/ Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: APR 30 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED APR 30 1991

PEREZ, S.A., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 90-2264 SSH
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	

ORDER

On March 14, 1991, the Court stayed this action pending the resolution of defendant's motion to dismiss in *Industria Panificadora, S.A., et al. v. United States,* Civil Action No. 90-1694, the first of seventeen cases before the Court that relate to losses incurred following the initiation of the United States' military operation in Panama in December 1989. Today, pursuant to an Opinion and Order, the Court has granted the United States' motion to dismiss in Civil Action No. 90-1694. Because the above-captioned case presents nearly identical legal issues, it is appropriate that it be dismissed as well. Accordingly, it hereby is

ORDERED, that the stay imposed by the Court on March 14, 1991, is lifted. It hereby further is

ORDERED, that the case is dismissed for the reasons set forth in the Court's Opinion issued today in Civil Action No. 90-1694.

SO ORDERED.

/s/ Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: APR 30 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED APR 30 1991

LINDO & MADURO, S.A., *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 90-2589 SSH
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	

ORDER

On March 14, 1991, the Court stayed this action pending the resolution of defendant's motion to dismiss in *Industria Panificadora, S.A., et al. v. United States*, Civil Action No. 90-1694, the first of seventeen cases before the Court that relate to losses incurred following the initiation of the United States' military operation in Panama in December 1989. Today, pursuant to an Opinion and Order, the Court has granted the United States' motion to dismiss in Civil Action No. 90-1694. Because the above-captioned case presents nearly identical legal issues, it is appropriate that it be dismissed as well. Accordingly, it hereby is

ORDERED, that the stay imposed by the Court on March 14, 1991, is lifted. It hereby further is

ORDERED, that the case is dismissed for the reasons set forth in the Court's Opinion issued today in Civil Action No. 90-1694.

SO ORDERED.

/s/ Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: APR 30 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED APR 30 1991

DIACOR, S.A. *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 90-2823
	)	SSH
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

ORDER

On March 14, 1991, the Court stayed this action pending the resolution of defendant's motion to dismiss in *Industria Panificadora, S.A., et al. v. United States*, Civil Action No. 90-1694, the first of seventeen cases before the Court that relate to losses incurred following the initiation of the United States' military operation in Panama in December 1989. Today, pursuant to an Opinion and Order, the Court has granted the United States' motion to dismiss in Civil Action No. 90-1694. Because the above-captioned case presents nearly identical legal issues, it is appropriate that it be dismissed as well. Accordingly, it hereby is

ORDERED, that the stay imposed by the Court on March 14, 1991, is lifted. It hereby further is

ORDERED, that the case is dismissed for the reasons set forth in the Court's Opinion issued today in Civil Action No. 90-1694.

SO ORDERED.

/s/ Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: APR 30 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED APR 30 1991

TERMINALES PANAMA, S.A.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 91-925 SSH
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	

ORDER

This is one of seventeen cases before the Court that relate to losses incurred following the intiation of the United States' military operation in Panama in December 1989. On March 14, 1991, the Court stayed eleven of the seventeen cases, pending the resolution of defendant's motion to dismiss in *Industria Panificadora, S.A., et al. v. United States*, Civil Action No. 90-1694, the first case filed. This action was filed on April 25, 1991, and, thus, it was not stayed.

Today, pursuant to an Opinion and Order, the Court has granted the United States' motion to dismiss in Civil Action No. 90-1694. Because this case presents nearly identical issues, it is appropriate that it be dismissed as well.[1] Accordingly, it hereby is

[1]As of the date of this dismissal, the United States has not yet responded to the complaint. However, based upon their practice in related cases filed earlier, it is clear that they would move to dismiss on the same grounds as they have in the earlier cases, including Civil Action No. 90-1694. Rather than wait for the motion to be filed, in the interest of judicial economy, the Court is dismissing the case at this juncture. This will facilitate plaintiffs' related appeals, if they choose to appeal. Moreover, plaintiffs have not been prejudiced by early dismissal, because their counsel have briefed the legal issues in earlier cases, and the Court has carefully considered those arguments.

ORDERED, that the case is dismissed for the reasons set forth in the Court's Opinion issued today in Civil Action No. 90-1694.

SO ORDERED.

/s/ Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: APR 30 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED APR 30 1991

CIA. PANAMENA DE ACEITES, S.A., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 91-495 SSH
UNITED STATES OF AMERICA,	)	
Defendant.	)	

ORDER

This is one of seventeen cases before the Court that relate to losses incurred following the intiation of the United States' military operation in Panama in December 1989. On March 14, 1991, the Court stayed eleven of the seventeen cases, pending the resolution of defendant's motion to dismiss in *Industria Panificadora, S.A., et al. v. United States,* Civil Action No. 90-1694, the first case filed. This action was filed on March 8, 1991, but the court did not receive a copy of the complaint until after it issued the March 14 Order. Thus, the case was not stayed.

Today, pursuant to an Opinion and Order, the Court has granted the United States' motion to dismiss in Civil Action No. 90-1694. Because this case presents nearly identical issues, it is appropriate that it be dismissed as well.[1] Accordingly, it hereby is

[1]As of the date of this dismissal, the United States has not yet responded to the complaint. However, based upon their practice in related cases filed earlier, it is clear that they would move to dismiss on the same grounds as they have in the earlier cases, including Civil Action No. 90-1694. Rather than wait for the motion to be filed, in the interest of judicial economy, the Court is dismissing the case at this juncture. This will facilitate plaintiffs' related appeals, if they choose to appeal. Moreover, plaintiffs have not been prejudiced by early dismissal, because their counsel have briefed the legal issues in earlier cases, and the Court has carefully considered those arguments.

ORDERED, that the case is dismissed for the reasons set forth in the Court's Opinion issued today in Civil Action No. 90-1694.

SO ORDERED.

/s/ Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: APR 30 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDUSTRIA PANIFICADORA, S.A., INMOBILIARIA SANTA ANA, S.A., and F.X. VIDEO CLUB, S.A., *Plaintiffs*,	)	Civil Action
v.	)	
UNITED STATES OF AMERICA, *Defendant*.	)	No. 90-1694 SSH

OPINION

This matter is before the Court on the motion of defendant United States of America to dismiss the complaint in the above-entitled action. For the reasons set forth below, defendant's motion is granted, and the case is dismissed.

Background

In considering a motion to dismiss, the Court must accept as true the factual allegations of plaintiffs' complaint, and any ambiguities must be resoived in plaintiffs' favor. *See Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). The following facts are taken from the complaint.

Plaintiffs, Industria Panificadora, S.A., Inmobiliaria Santa Ana, S.A., and F.X. Video Club, S.A., have brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C.A. §§ 2671-2680, and under the Alien Tort Claims Act (ATCA), 28 U.S.C.A. § 1350, to recover damages for property losses.[1] Plaintiffs are corporations organized and existing under the laws of the Republic of

[1]In addition, sixteen related cases have been filed. Eleven cases were stayed by the Court's Order of March 14, 1991, pending the resolution of defendant's motion to dismiss in this case. Those cases include the following: Civil Action No. 90-1966; Civil Action No. 90-2264; Civil Action No. 90-2266; Civil Action No. 90-2281; Civil Action No. 90-2405; Civil Action No. 90-2589; Civil Action No. 90-2756; Civil Action No. 90-2823; Civil Action No. 90-2952; Civil Action No. 90-3061; and Civil Action No. 91-118. Subsequent to the issuance of that Order, five more related cases were filed: Civil Action No. 91-495; Civil Action No. 91-596; Civil Action No. 91-887; Civil Action No. 91-925; and Civil Action No. 91-945.

Panama, with their principal places of business in Panama City, Panama.

On or about December 20, 1989, United States Armed Forces engaged General Manuel Noriega's Panamanian Defense Force ("PDF") in Panama. The fighting was short-lived. In only a few days, the U.S. Armed Forces had defeated the PDF and caused the removal of General Noriega from power. The U.S. Armed Forces remained in Panama until approximately January 10, 1990. During part of this period, plaintiffs' properties were looted, burned, and destroyed by Panamanian civilians while the PDF, whose duties included the maintainance of public order, was engaged militarily with the U.S. Armed Forces. Attributing their property damages to defendant's alleged negligence, plaintiffs submitted claims to the United States Department of State for compensation. These claims were rejected. Through this action, plaintiffs now seek recovery for damages in the amount of $1,506,823.00.

Plaintiffs assert that the U.S. Armed Forces, by defeating the PDF, assumed the PDF's duty of maintaining public order in the alleged Occupied Zone.[2] Plaintiffs allege that unspecified U.S. personnel in Washington, D.C., breached such a duty by negligently failing to provide adequate numbers of police personnel to maintain public order. (Amended Complaint, paragraph 5.) Plaintiffs assert that they suffered damages as a direct and foreseeable consequence of such a decision.

Although the Court stayed those cases for administrative convenience, the Court did review the plaintiffs' arguments in those cases that were briefed, principally in light of the fact that plaintiffs' counsel in some of the cases are different from counsel in the above-captioned case. *See* Plaintiffs' Motion To Lift Stay, filed in Civil Action No. 90-1966.

[2]One disputed issue is whether the United States owed a duty to plaintiffs of maintaining public law and order under the Hague Convention, to which the United States is a signatory. The Hague Convention would apply where Panama was an "occupied territory." Plaintiffs assert that the U.S. Armed Forces displaced the PDF, thus transforming the area in question into an "occupied territory." Defendant maintains that the increase in U.S. military forces in Panama did not displace the authority of the legitimate government in Panama. (Declaration of Richard A. Clarke.) Defendant also denies plaintiffs' assertion that there was a United States policy decision to assume police power functions in Panama. (Declaration of Richard A. Clarke.) Because this action must be dismissed under the discretionary function exception to the FTCA, it is not necessary to address this issue definitively.

Defendant argues that plaintiffs' action must be dismissed because the Court lacks subject matter jurisdiction under the FTCA and the ATCA. Alternatively, defendant argues that this suit presents a nonjusticiable political question.

Discussion

A. *Federal Tort Claims Act*

The FTCA was designed to render the United States liable for its torts essentially in the same manner and to the same extent as an individual, in like circumstances, under the law of the place where the wrong occurred. *See United States v. Yellow Cab Co.*, 340 U.S. 543 (1951). However, liability under the Act does not give rise to a carte blanche. The United States is liable only in the manner and to the extent to which it has consented. Although the FTCA "waives the Government's immunity from suit in sweeping language," *id.* at 547, the waiver is limited by the terms of the Act's exceptions. If a claim falls within any exception to the FTCA, sovereign immunity has not been waived and the court is without jurisdiction to hear the case. *United States v. Orleans*, 425 U.S. 807, 814 (1976).

In its motion to dismiss, defendant argues that several such exceptions bar suit under the FTCA. They are: (1) the foreign country exception (28 U.S.C.A. § 2680(k)); (2) the combatant activities exception (28 U.S.C.A. § 2680(j)); (3) the exception that applies where where there is no actionable duty under applicable state law (28 U.S.C.A. §§ 1346(b), 2674); and (4) the discretionary function exception (28 U.S.C.A. § 2680(a)). Because the Court finds that the discretionary function exception applies to this case, the remaining three exceptions need not be addressed.

1. *Discretionary Function Exception*

The discretionary function exception includes:

> "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or

> duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

28 U.S.C.A. § 2680(a).

This exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). Where that "boundary" lies, however, has been subject to much interpretation by courts, because Congress did not clearly define "discretionary function."[3]

The discretionary function exception articulates a policy of preventing tort actions from becoming a vehicle for judicial interference with decision-making that is properly exercised by other government branches. The exception embodies the separation of powers. *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978). The seminal case of *Dalehite v. United States*, 346 U.S. 15 (1953), sets forth a broad interpretation of the exception. In that case, the Court held that the discretionary function exception barred recovery for claims arising from a massive fertilizer explosion. The fertilizer had been manufactured, packaged, and prepared for export pursuant to detailed regulations as part of a comprehensive federal program aimed at increasing the food supply in occupied areas after World War II. *Id.* at 19-21. Not only was the cabinet-level decision to institute the fertilizer program discretionary, but so too were the decisions concerning the specific requirements for manufacturing the fertilizer. *Id.* at 37-38. The Court stated:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initia-

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[3]Historically, the discretionary function derives from the considerable body of case law which gives to federal officials an immunity from suits arising out of certain kinds of official acts. The reason most frequently advanced for this immunity is the fear that the threat of damage suits would stultify decision-making. *See* Note, *Development in the Law—Remedies Against the United States and its Officials*, 70 HARV. L. REV. 827, 892 (1957).

> tion of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion.

Id. at 35-36.

Unfortunately, the "lower court decisions since *Dalehite* do not comprise a particularly coherent body of case law." *Blessing*, 447 F. Supp. at 1172.[4] In determining whether the discretionary function exception applies, some courts have made a distinction between "planning" and "operational" decisions. Such a distinction is confusing because "planning" is seldom one defined stage of an overall operation.[5] "At what point, if any, are programmatic decisions and refinements made at the operational rather than at the planning level?" *Id.* at 1173 n.19. This question exemplifies the line-drawing problem that lower courts have faced in dealing with the discretionary function exception.

Recently, the Supreme Court clarified the planning/operational distinction. The Court criticised lower courts' interpretation of this matter, stating that they were "perpetuating a nonexistent dichotomy between the discretionary functions and operational activities." *United States v. Gaubert*, 59 U.S.L.W. 4244, 4247 (U.S. Mar. 26,

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[4]*Compare, e.g., Monarch Insurance Co. v. District of Columbia*, 353 F. Supp. 1249, 1258-1259 (D.D.C. 1973) (planning and implementation of a riot control program for use during civil orders is a discretionary function), *aff'd*, 497 F.2d 684, *cert. denied*, 419 U.S. 1021 (1974), *with Downs v. United States*, 522 F.2d 990 (6th Cir. 1975) (FBI agent's decision on how to handle an airplane hijacking not a protected act of discretion), *and Miller v. United States*, 410 F. Supp. 425 (E.D. Mich. 1976) (negligent operation of waterworks protected by discretionary function exception), *modified*, 583 F.2d 857 (6th Cir. 1978), *with Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.) (negligent operation of airport control tower not a protected act of discretion), *cert. denied*, 389 U.S. 931 (1967).

[5]The court in *Blessing* summed up this problem, stating "[t]he frontier where planning ends and operations begin . . . is seldom sharply marked. Because plans and programs are not often put into effect mechanically, judgments of varying sorts and degrees must be made in taking all but the most reflexive actions. Accordingly, most operations retain some 'planning' elements right up to the final execution." 447 F. Supp. at 1173 n. 19. In *Dalehite*, the Supreme Court similarly recognized that the "planning" function extends beyond the mere "initiation of programs" and "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations." 346 U.S. at 35-36.

1991) (No. 89-1793). In *Gaubert*, the United States Court of Appeals for the Fifth Circuit had held that the Federal Home Loan Bank Board and the Federal Home Loan Bank-Dallas had been negligent in carrying out their supervisory activities over certain aspects of a thrift institution's operation and that those actions were not within the discretionary function exception. 885 F.2d 1284 (5th Cir. 1989). The Supreme Court reversed, stating that "[d]iscretionary conduct is not confined to the policy or planning level." 59 U.S.L.W. at 4247. Rather, "[a] discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy-making or planning functions." *Id.* at 4247. Moreover, "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines*, 467 U.S. at 813.

Other recent cases also have defined the nature of the conduct for which the exception is intended to apply. In *Varig Airlines*, the Court held that the Federal Aviation Administration's actions in formulating and implementing a "spot-check" plan for airplane inspection was protected by the discretionary function exception because of the agency's authority to establish safety standards for airplanes. *Id.* at 815. Actions taken in furtherance of the program were likewise protected, even if those particular actions were negligent. *Id.* at 820. In *Berkovitz v. United States*, 486 U.S. 531, 533 (1988), the Court examined a comprehensive regulatory scheme governing the licensing of laboratories to produce polio vaccines and the release of particular drugs to the public. The Court found that some of the claims fell outside the exception, but only because the agency employees had failed to follow the specific directions contained in the applicable regulations, and that in those instances, there was no room for choice or judgment. *Id.* at 542-543. The case was remanded for analysis of the remaining claims in light of the applicable regulations. *Id.* at 544. The Court stated: "[A]ssuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary funciton was designed to shield." *Id.* at 536.

The nature of the conduct reviewed in *Monarch Insurance Co. v. District of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974), is comparable to that of the instant case. In *Monarch*, this court held that the discretionary function exception barred claims challenging

the adequacy of troops and police forces assigned in connection with third-party looting following the assassination of Dr. Martin Luther King, Jr. Similarly, in *Smith v. United States*, 330 F. Supp. 867 (E.D. Mich. 1971), the court held that the discretionary function exception applied. The plaintiff Smith, who was shot by National Guardsmen during a city riot, alleged negligence on the part of the Secretary of Defense and high-ranking officers of the National Guard and the Army. *Id.* at 868. The court stated:

> The means and method of restoring order in a city faced with anarchy and breakdown of civilian authority are delegated to the Executive Branch of the Government, not the judiciary. That some may say with the wisdom of hindsight that the National Guard was not sufficiently prepared to cope with the delicate task of quelling a riot . . . does not create a cause of action. It is more appropriately a plea addressed to the legislative and executive branches of the Government.

Id. at 869.

In addition, it is clear that the discretionary function exception protects military policy judgments. In *Boyle v. United Technologies Corp.*, the Court stated:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of [28 U.S.C.A. § 2680(a)]. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.

487 U.S. 500, 511 (1988).

The discretionary function exception is clearly applicable to the instant case. This case involves Executive Branch judgments that are grounded in political, military, and foreign policy considerations. Plaintiffs' amended complaint unquestionably challenges Executive Branch decisions concerning the numbers of military personnel to be utilized, their deployment, and the kinds of orders that should be issued in furtherance thereof.

Plaintiffs assert that "[t]he record in this case is admittedly far too preliminary for any positive conclusions at this time, but it is clear that the negligence alleged does not involve the formulation of policy or the performance of any quasilegislative or judicial functions." (Plaintiffs' Opposition, at 27-28.) The facts show otherwise. In their amended complaint, plaintiffs assert that the "high officials" in Washington who "planned" the military action were negligent, not the U.S. personnel in Panama that handled the "operational" matters. Plaintiffs assert that this case does not question military strategy or foreign policy decisions by the Executive Branch. Yet they seek to distinguish the decision to undertake military action from the decision on how many military police to utilize in Panama. They do not question the U.S. decision to engage the PDF, but they do question the Executive Branch's decision on how to handle the aftermath of the initial attack. Because both decisions involved planning of the U.S. military operation in Panama, this distinction is unconvincing.

Although plaintiffs urge that the United States has consented to this lawsuit and is liable for negligent acts at the "operational level," the Court concludes that their factual allegations fall squarely within the area of the discretionary function exception.[6]

B. *Nonjusticiable Political Question*

Defendant also argues that plaintiffs' action should be dismissed because it involves a nonjusticiable political question. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 (1986). Both the separation of powers doctrine and the policy of judicial self-restraint require that federal courts refrain from intrusion into areas committed by the Constitution to the Legislative and Executive Branches of the Government. *Baker v. Carr*, 369 U.S. 186

[6]Plaintiffs also purport to bring this action under the Alien Tort Claims Act, 28 U.S.C.A. § 1350. However, defendant correctly argues that the ATCA is not itself a waiver of the sovereign immunity of the United States. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985). Plaintiffs argue that the waiver is provided by the FTCA. However, because this case falls within the discretionary function exception, sovereign immunity has not been waived.

(1962). The Supreme Court has defined "nonjusticiability" as "the inappropriateness of the subject matter for judicial consideration." *Id.* at 198. The Court also has defined those elements that serve to identify nonjusticiable political questions. It has stated:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

If one of these conditions is inextricable from the case at bar, then adjudication of the case may be said to require resolution of a political question, which is nonjusticiable and hence not reviewable by a court. *Id. See also Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332, 1335 (S.D.N.Y. 1984). However, while only one of these elements must be present, it must be significant for there to be a nonjusticiable political question. *Baker*, 369 U.S. at 217. The Court finds that several of the *Baker* elements present themselves in the instant case.

Plaintiffs' allegations fall within the first element discussed in *Baker*. It is well established that decisions pertaining to national security, such as whether and how to use military forces, are entrusted to the political branches. CONST. Art. II.[7]

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[7]There is considerable case law in this area. *See, e.g., Haig v. Agee*, 453 U.S. 280, 292 (1981) (matters closely related to foreign policy and national security rarely proper for judicial intervention); *DaCosta v. Laird*, 471 F.2d 1146, 1154 (2d Cir. 1973) (Article II, § 2 of the Constitution is a "specific textual commitment of decision-making responsibility in the area of military operations in a theatre of war to the President, in his capacity as Commander in Chief"); *United States ex rel. Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954) (responsibility for

In addition, the instant case falls within the second element of *Baker*, because decisions which affect our national security involve policy decisions beyond the scope of judical expertise. "To attempt to decide such a matter without the necessary expertise and in the absence of judicially manageable standards would be to entangle the court in matters constitutionally given to the executive branch." *In re Korean Air Lines Disaster*, 597 F. Supp. 613, 616 (D.D.C. 1984), *aff'd*, 829 F.2d 1171 (D.C. Cir. 1987).

The issues of the instant case are comparable to those in *Nejad v. United States*, 724 F. Supp. 753, 754 (C.D. Cal. 1989). In that case, plaintiffs brought an FTCA action based upon the Navy's shooting down of an Iranian airliner over the Persian Gulf. Plaintiffs asserted that the political question doctrine should not apply because they did not challenge the President's decision to send warships to the Persian Gulf but only the manner in which the President's decision was carried out by the Navy. The court rejected such a distinction, stating:

> Here, it is indubitably clear that plaintiffs' claim calls into question the Navy's decisions and actions in execution of those decisions. The conduct of such affairs are constitutionally committed to the President as Commander in Chief and to his military and naval subordinates. Thus, the claim here implicates possibly all and at least formulations [1], [4], [5] and [6] of *Baker v. Carr*. Plaintiffs contend that they do not call into question the President's decision to send U.S. warships to the Persian Gulf, but only the negligent manner in which the President's decision was carried out. This contention too must fail.
>
> [T]he same considerations which preclude judicial examination of the decision to act must necessarily bar examination of the manner in which that decision was executed by the President's subordinates. The textual commitment to the President as commander in chief of authority for military decision entails that his decision may be implemented without judicial scrutiny. . . .

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dealing with foreign nations over the seizure of American property or persons is clearly committed to the President), *cert. denied*, 348 U.S. 952 (1955).

Id. (quoting *Rappenecker v. United States*, 509 F. Supp. 1024, 1030 (N.D. Cal. 1980)).

Similarly, this court in *Monarch* stated that "[p]olicy considerations directly related to objectives which are, in the strictest sense of the term, governmental or political pervade every phase of planning and executing a riot control program. Such considerations point not only to discretionary functions free from liability under the Tort Claims Act but to political questions which are beyond the jurisdiction of this Court." 353 F. Supp. at 1258.

In the instant case, plaintiffs assert that their suit "does not call into question any foreign policy or military decision by the President or any other policy maker in the Executive Branch." (Plaintiffs' Opposition, at 37.) Plaintiffs state that their suit is "for property damages caused by negligence in the exercise of police power." (Plaintiffs' Opposition, at 37.) At the same time, plaintiffs assert that "[t]he negligence on which this action is based is the failure by the United States personnel located in Washington, and in command of the military incursion, to assign sufficient military police after the civil disorders in Panama City occurred." (Plaintiffs' Opposition, at 21.)

Plaintiffs' assertions contradict themselves. The decision on how many military police to assign to Panama was a decision made by the military. Thus, while plaintiffs carefully worded their amended complaint to suggest a basis in traditional tort concepts of due care and negligence, their allegations implicate broader political questions that encompass U.S. foreign policy and military operations. Any judicial inquiry into the reasonableness of the decisions at issue would require that this Court second-guess Executive Branch decisions, some of which were made while military personnel were engaged in combat. Such an inquiry would be fraught with national security considerations and unmanageable political and military issues. Not only are there no judicially manageable standards for the Court to follow in resolving these issues, but an independent resolution would show a lack of respect due to a coordinate branch. Although plaintiffs contend that this case does not possess those elements set forth in *Baker*, the facts show that plaintiffs' action involves judicial review of executive branch decisions pertaining to the nature, conduct, and implementation of a presidentially-directed military operation in a foreign country. This goes to the heart of the political question doctrine. Therefore, the Court

concludes that plaintiffs' claim presents a clear nonjusticiable political question. Because plaintiffs' claims fall within the discretionary function exception to the FTCA and because they present a nonjusticiable political question, the case must be dismissed.[8]

An appropriate Order accompanies this Opinion.[9]

/s/ Stanley S. Harris
Stanley S. Harris
United States District Judge

Date: APR 30 1991

[8]In light of the Court's ruling, and in the interest of efficient administration in the event of an appeal, the Court will lift the stays in the eleven cases set forth *supra* in footnote 1, and simultaneously will dismiss all sixteen related cases for the reasons set forth above.

[9]The Court is sympathetic to the circumstances which led to the filing of these related lawsuits; the Court deplores the looting and pillaging by Panamanian civilians which led to the losses plaintiffs have suffered. However, there cannot be a judicially imposed remedy for all wrongs.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5147

September Term, 1990
FILED AUG 16 1991
CA. No. 90-01649

Industria Panificadora, S.A., *et al.*,
Appellants

v.

United States of America

BEFORE: Buckley and Sentelle, Circuit Judges

ORDER

Upon consideration of the motion to stay, or in the alternative, for an extension of time, and the responses thereto; the motions to consolidate, the responses thereto and the reply; the motion to file motion to intervene out of time; and appellant's motion to extend time and to exceed page limits, it is

ORDERED that No. 91-5139, *Distribuidora Comercial Vicky, S.A., et al. v. United States*; No. 91-5144, *Victoria Enterprise S.A., et al. v. United States*; No. 91-5145, *S.A. Rafbar, et al. v. United States*; No. 91-5146, *Centro Marino, S.A., et al. v. United States*; No. 91-5148, *Bonmark, S.A., et al. v. United States*; No. 91-5149, *Vida Panama, S.A., et al. v. United States*; No. 91-5150, *Panameubles, S.A., et al. v. United States*; No. 91-5151, *Palacio Musical, S.A., et al. v. United States*; No. 91-5156, *Lindo Marduro, S.A. v. United States*; No. 91-5161, *Cia Panamena de Aceites, S.A., et al. v. United States*; No. 91-5162, *Terminales Panama, S.A. v. United States*; No. 91-5163, *Recardo Perez, S.A., et al. v. United States*; No. 91-5164, *Diacor, S.A., et al. v. United States*; No. 91-5165, *Cencal, S.A., et al. v. United States*; No. 91-5169, *Rodelag, S.A., et al. v. United States*, be held in abeyance pending disposition of the summary affirmance motion pending in No. 91-5147. It is

FURTHER ORDERED that consideration of the motions for consolidation be deferred pending disposition of the summary affirmance motion pending in No. 91-5147. It is

FURTHER ORDERED that the motion for leave to file motion to intervene out of time be granted. The Clerk is directed to file the lodged motion. It is

FURTHER ORDERED that the motion to intervene be granted. Intervenors' response appellee's motion for summary affirmance shall not exceed ten pages and shall not repeat arguments made by appellants in their response to the summary affirmance motion. Intervenors' response to appellee's motion for summary affirmance is now due within seven days from the date of this order. It is

FURTHER ORDERED that the appellants' motion to exceed the page limits be denied. Appellants have failed to present "extraordinary and compelling reasons" to justify exceeding the twenty-page limit prescribed by D.C. Cir. Rule 7(a)(2). *See* D.C. Cir. Rule 7(k)(3). Appellants' conforming response to appellee's motion for summary affirmance is now due within three days from the date of this order.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5139

September Term, 1991
FILED March 6, 1992
91cv00118

Distribuidora Comercial Vicky, S.A., *et al.*,
Appellants

v.

United States of America, *et al. and*

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consolidated cases

91-5147

90cv01694

Industria Panificadora, S.A., *et al.*,
Appellants

v.

United States of America

BEFORE: Mikva, Chief Judge; Ruth B. Ginsburg and D.H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion for leave to submit a second diplomatic note, and the court's *per curiam* opinion and order issued this date, it is

ORDERED that the motion be dismissed as moot, as to No. 91-5147. It is

FURTHER ORDERED that the motion be held in abeyance as to the consolidated cases, pending appellants' response to the court's order to show cause.

The Clerk is directed to place a copy of this order in Nos. 91-5139 et al., and in No. 91-5147.

Per Curiam

FOR THE COURT:
Constance L. Dupré, Clerk

By: /s/ Linda Jones
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5147

September Term, 1991
FILED APR 15 1992
90cv01694

Industria Panificadora, S.A., *et al.*,
Appellants

v.

United States of America

BEFORE: Mikva, Chief Judge; Ruth B. Ginsburg and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied. In opposing the motion for summary affirmance, appellants expressly disavowed reliance on the Hague Convention as generative of a private right of action separate from the Federal Tort Claims Act; the argument, therefore, is improperly tendered at this late date. *See Bullock v. Mumford*, 509 F.2d 384, 388 (D.C. Cir. 1974) (grounds for reversal not previously placed before the court not considered on petition for rehearing); *Schooler v. Schooler*, 173 F.2d 299, 302-03 (D.C. Cir. 1948) ("fairness to appellees and our obligation to other litigants require that we should not permit this appeal, after it has been presented and lost on one basis, to be presented again on an opposite basis"). Further, no court has held that the Convention supports such a right of action. *See, e.g., Dreyfus v. Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985). Finally, appellants' challenge to our application of the discretionary function exception is insubstantial.

Per Curiam

FOR THE COURT:
Constance L. Dupré, Clerk

/s/ Robert A. Bonner
By: Robert A. Bonner
Deputy Clerk

Hague Convention IV, 1907, 36 Stat. 2277, 2290

Article 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Hague Convention IV, 1907, Annexed Regulations, 36 Stat. 2277, 2306

Article 42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

28 U.S.C. § 1346(b) (1976) United States as defendant

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674 (1991) Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

* * *

28 U.S.C. § 2680 (1991) Exceptions [to United States liability]

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

* * *

República de Panamá

Panamá, R. de P.

Ministerio de Rolaviones Esleriores
Despacho de Ministro
D. M. No. 678

19 de agosto de 1991

Señor Embajador:

Tengo el honor de dirigirme a Vuestra Excelencia para hacer de su conocimiento los hechos y circunstancias que más adelante se mencionan, con la esperanza de que los problemas planteados como consecuencia de ellos, puedan encontrar una pronta y amístosa solución entre los dos Gobiernos.

Como es del conocimiento de Vuestra Excelencia, el 20 de diciembre de 1989 las Fuerzas de Defensa de Panamá fueron desarticuladas y dispersas rápida y efectivamente por tropas de los Estados Unidos de América, quedando el país sin una fuerza policial apta para mantener la ley y el orden público, ya que las tropas estadunidenses no intentaron en ningún momento asumir estas responsabilidades. Como consecuencia de lo anterior, individuos no identificados realizaron extensos y sustantiales saqueos, pillajes y otras conductas delictivas contra establecimientos comerciales, depositos y de diversa naturaleza, de propiedad de inocentes civiles, dando asi lugar a que los dueños de dichos establecimientos sufrieran pérdidas por millones de dolares, las cuales compañías de seguros por las péridídas por algunos comerciantes asegurados han sido rechazados por las aseguradoras por provenir de actos de guerra. Ante esta realidad, a las victimas de las pérdidas a las que he hecho referencia no ha quedado otra alternativa que la de acudir a los tribunales de los Estados Unidos de América, a fin de obtener una compensación justa y equitativa. Entiendo, asimismo, que las acciones judiciales emprendidas se fundamentan en claras disposiciones del Derecho Internacional Público, entre las que se pueden citar la Convención

A Bu Excelencia
Deane R. Hinton
Embajador de los Estados Unidos de American
Panamá.-

de la Haya de 1907 relativa a las Leyes y Costumbres de la Guerra Terrestre.

Sin ánimo de prejuzgar los resultados de tales acciones, a petición de las victimas, solicito muy respetuosamente que el Gobierno de los Estados Unidos de América considere cuidadosamente las razores que motivaron las acciones judiciales que han sido interpuestas, con objeto de que las personas cuyas propiedades fueron destruidas y saqueadas puedan obtener una justa y equitativa compensación.

Confio en poder seguir conversando sobre este asunto con los funcionarios competentes del Gobierno de los Estados Unidos de América y en poder brindar cualquier asistencia, si fuere necesario, que facilite el pago de estas compensaciones.

Aprovecho la oportunidad para reiterar a Vuestra Excelecia las seguridades de mi alta y distinguida consideración.

Julio E. Linares
Ministro

cc.: Excelentísimo Señor Presidente de la República
Sr. Manuel Berrocal
Sr. Nathanial Méndez Goytía
Presidente del Conep

[Translation]

REPUBLIC OF PANAMA

Panama, R of P

The Ministry of Foreign Relations
Note of the Ministry
Ministry Note No. 678

August 19, 1991

Mr. Ambassador:

I have the honor to bring to your Excellency's attention the following issues and circumstances in the hope that the issues raised as a consequence of those circumstances can be brought to a prompt and amiable resolution between our two Governments.

As your Excellency is aware, on December 20, 1989, the defense forces of Panama were quickly and effectively defeated and disbursed by the troops of the United States of America, thereby leaving the country without a police force able to maintain public law and order especially as troops of the United States at no time evidenced any intention of assuming those responsibilities. As a result of the foregoing, unidentified individuals committed extensive and substantial looting, pilferage and other illegal acts against commercial establishments, warehouses, and other privately owned property of innocent civilians thus inflicting upon the owners of these establishments losses in the millions of dollars, which losses in many cases represented the entire life savings of these individuals.

It is my understanding that the claims presented to the insurance companies for the losses suffered by insured businessmen have been declined by the companies based on the act of war ex-

To your Excellency
Deane R. Hinton
Ambassador of the United States of America
Panama

ception. In view of this situation, the victims who suffered the above described losses determined that they had no alternative but to institute actions in the courts of the United States of America in order to try to obtain just and equitable compensation. I also understand that the pending actions are based on clear provisions of public international law, including the 1907 Hague Convention Respecting the Laws and Customs of War on Land.

Without wishing to prejudge the outcome of these actions, I respectfully request, on behalf of the victims, that the United States Government carefully consider the reasons which motivated the filing of the lawsuits, such being to assure that those who suffered the destruction of their property may obtain just and equitable compensation.

I count on being able to communicate with appropriate officials of the United States Government concerning this matter and to provide whatever assistance may be necessary to facilitate the payment of such compensation.

I take this opportunity to reiterate to your Excellency the assurances of my high and distinguished consideration.

/s/ Julio E. Linares
Julio E. Linares
Minister

cc: His Excellency the President of the Republic
Sr. Manual Berrocal
Sr. Nathaniel Mendez Goytia
President of Conep

República de Panamá

Panamá, R. de P.

Ministerio de Relaciones Exteriores
Despacho del Ministro
D.M. No. 050

21 de enero de 1992

Señor Embajador:

Nuevamente tengo el honor de dirigirme a Vuestra Excelencia para referirme a la situación de las personas, nacionales o extranjeras residentes en Panamá, cuyos establecimientos comerciales y propiedades fueron saqueadas, dañadas o destruidas durante los sucesos de finales del mes de diciembre de 1989.

En mi nota D.M. No. 678, tuve el honor de relatar a Vuestra Excelencia algunos hechos concernientes a estas desafortunadas personas: Que el 20 de diciembre de 1989, tropas de los Estados Unidos de América destruyeron y dispersaron a las antiguas Fuerzas de Defensa de Panamá; que, como resultado de lo anterior. Panamá estuvo, durante un lapso o periodo de tiempo, sin una fuerza de policía local que le permitiera mantener la ley y el orden; y que, debido a la ausencia de tal fuerza de policía, en los días que siguieron a la invasión hubo un resquebrajamiento total del orden público, que condujo a circunstancias en que vándalos no identificados saquearon y robaron, y en alguna otra forma dañaron o destruyeron los establecimientos comerciales, depósitos o bodegas y otras propiedades pertenecientes a inocentes civiles de mi país.

En mi nota antes aludida, también describí a Vuestra Excelencia los esfuerzos que realizan algunas de estas victimas inocentes, ante los Tribunales de los Estados Unidos de América, para obtener una justa y equitativa compensación por los daños y perjuicios sufridos, conforme a las normas y principios del Derecho Internacional Público, incluyendo las disposiciones contenidas en la Convención de La Haya de 1907 relativa a las Leyes y

Se Excelencia
Deane R. Hinton
Embajador de los Estados Unidos de América

Costumbres de la Guerra Terrestre. Sin deseos de prejuzgar los resultados de estas acciones legales, respetuosamente solicito por Vuestra digno conducto que el Ilustrado Gobierno de los Estados Unidos de América considere cuidadosamente las razones que motivaron la presentación de tales acciones, a fin de asegurar que una compensación justa y equitativa pueda obtenerse para aquéllos que sufrieron daños o destrucción a sus propiedades.

Mi Gobierno ha sabido que recientemente en los juicios que se tramitan ante los Tribunales estadounidenses, el Gobierno de los Estados Unidos de América ha expresado la opinion que es necesario que el Gobierno de Panama solicite que sean aplicadas las disposiciones contenidas en la Convención de La Haya de 1907, a fin de que los reclamos de estos cuidadanos sean considerados. En vista de lo anterior, tengo el honor de notificar a Vuestra Excelencia, en nombre de las personas y de los ciudadanos de mi País, cuyas propiedades fueron dañadas o destruidas, que es el deseo del Gobierno de Panama que la Convención de La Haya de 1907 sea aplicada en y por los tribunales de los Estados Unidos de América. de la misma manera como se aplican localmente todas las normas del Derecho Internacional Público por los Estados que han contribuido a su formación o se han adherido a él.

Mi Gobierno reitera que no desea prejuzgar los resultados de ningún juicio en particular. Sin embargo, en la medida en que los reclamantes puedan individualmente demostrar que sufrieron daños o perjuicios que la Convención de la Haya de 1907 intentó impedir, nuevamente, con todo respeto, solicito que esos reclamos reciban una consideracion justa e imparcial en y por los Tribunales de los Estados Unidos de América.

Debido al gran número de tales reclamos y a la multiplicidad de los diferentes daños y perjuicios sufridos, mi Gobierno no tiene objección a que los individuos perjudicados procedan por su propia cuenta, como ocurre, por ejemplo, con respecto a los reclamos de que trata la Convención de Varsovia de 1929 relacionada al Transporte Aéreo Internacional. Mi Gobierno también cree que bajo estas circunstancias únicas, los tribunales civiles están calificados para evaluar las pruebas concernientes a las perdidas, daños y perjuicios ocasionados a las propiedades que los reclamantes presentarán.

Mi Gobierno agradecerá que Vuestra Excelencia presente estos puntos de vista a la atención de los Tribunales y/u otros organis-

mos judiciales o administrativos de los Estados Unidos de América, ante los cuales acciones o demandas han sido presentadas y se tramitan en la actualidad.

Aprovecho la opportunidad para renovar a Vuestra Excelencia las seguridades de mi alta consideración.

/s/ Julio E. Lineares
Julio E. Linares
Ministro

REPUBLIC OF PANAMA

Panama, R. of P.

Ministry of Foreign Affairs
Office of the Minister
D.M. No. 050

January 21, 1992

Mr. Ambassador:

I again have the honor to address myself to your Excellency concerning the circumstances of citizens of my country or foreigners residing in Panama whose commercial establishments and property were looted, damaged, or destroyed during the events of late December 1989.

In my Note No. 678, I had the honor of relating to Your Excellency some of the facts concerning these unfortunate individuals: that on December 20, 1989, troops of the United States of America defeated and dispersed the former defense forces of Panama; that, as a result of the foregoing, Panama was, for a considerable period, without any indigenous police force able to maintain public law and order; and that, because of the absence of such a police force, in the days following the invasion, there was a total breakdown of public order, leading to circumstances where unidentified vandals looted and pilfered property from, and otherwise damaged or destroyed, the commercial establishments, warehouses and other property owned by these innocent civilians of my country.

In my aforementioned note, I also described for your Excellency the efforts of certain of these innocent victims before the Courts of the United States of America, to obtain just and equitable compensation for their injuries in accordance with and pursuant to prevailing principles of public international law, including the 1907 Hague Convention Respecting the Law and Customs of War. Without wishing to prejudge the outcome of these legal actions, I

Your Excellency
Dean R. Hinton
Ambassador to the United States of America

respectfully request that the Government of the United States of America carefully consider the reasons which motivated the filing of those actions in order to assure that some just and equitable compensation might be obtained by those who suffered damage to or destruction of their property.

My Government has learned that recently in the Court proceedings pending before the Courts of the United States, the Government of the United States of America has expressed the view that it is necessary for the Government of Panama to request enforcement of the provisions of the 1907 Hague Convention in order for these citizens' claims to be considered. In view thereof, I have the honor to advise your Excellency that, on behalf of the persons and citizens of my country whose property was so damaged or destroyed, it is the desire of the Government of Panama that the 1907 Hague Convention be applied in and by the courts of the United States in the same manner as all public international laws are adhered to and enforced by their signatory nations.

My Government emphasizes that it does not wish to prejudge the outcome of any particular proceeding. However, insofar as individual claimants are able to establish that they suffered damage or injury which the 1907 Hague Convention was intended to prevent, we again respectfully request that those claims be given fair and impartial consideration in and by the Courts of the United States of America.

Because of the large number of these claims, and the multiplicity of different injuries, my government does not object to the injured individuals proceeding on their own behalves, as is the case, for example, with respect to claims under the Warsaw Convention of 1929 Relating to International Transportation by Air. My Government also believes that in these unique circumstances civil courts are best equipped to evaluate the proofs of loss, damage and injury to property that claimants such as these will present.

My Government would appreciate if Your Excellency would bring these views to the attention of the courts and/or other judicial or administrative bodies of the United States of America where these law actions have been filed and are now pending.

I take this opportunity to reiterate to your Excellency the assurances of my high and distinguished consideration.

Julio E. Linares
Minister

No. 92-399

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LINDO & MADURO, S.A. *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE GOVERNMENT OF PANAMA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1992

No. 92-399

LINDO & MADURO, S.A. et al.

Petitioners

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UNITED STATES OF AMERICA

Respondent

On Petition for a Writ of Certiorari To the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE GOVERNMENT OF PANAMA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI*

THE INTEREST OF THE AMICUS CURIAE

(a) Statement of the Issues

The petition for certiorari in this case presents two related questions for review. *First*, does the doctrine of sov-

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* Both Petitioner and Respondent have consented to the appearance of the Government of Panama as an amicus curiae, and the written consents are on file with the Clerk. The Government of Panama has previously submitted two Diplomatic Notes to the Government of the United States in connection with this litigation, but these Notes were not accepted by the Court of Appeals on motion of Petitioners. The Diplomatic Notes are reproduced (in Spanish and English) in the Appendix to the Petition.

ereign immunity as practiced in the United States shield the United States government from its obligations under the Hague Convention of 1907 (IV) Respecting the Laws and Customs of War on Land; and *second*, do the obligations under the Hague Convention include responsibility to civilians who suffer damage as a result of a government's failure to comply with the commands of the Convention. The Court of Appeals, in a brief *per curiam* decision in a companion case (Pet. App. 3a), answered the first question in the affirmative, and did not reach the second question. An underlying question, not addressed either by the Court of Appeals or by the District Court (Pet. App. 20a), and but casually referred to in an "Even if . . ." subordinate clause in the opinion of the Court of Appeals (Pet. App. 4a), concerns the applicability to the events of Operation Just Cause of the Hague Convention Respecting the Laws and Customs of War on Land of 1907.

Panama, like the United States, is an original party to the Hague Convention and has a strong interest in its correct interpretation and application. In its submission to the Court of Appeals in one of the related cases, the U.S. Department of Justice asserted that the Convention was not applicable. Other statements of United States officials, in connection with the operation in Panama (1989) as well as analogous instances (Grenada 1983, Iraq 1991), have indicated that the United States does regard the Hague Convention (as well as the 1949 Geneva Convention) applicable in defining the obligations of United States forces in such situations. The Government of Panama sets forth hereafter its own position on the applicability of the Hague Convention. It urges the U.S. Supreme Court to use the opportunity presented by the instant case to clarify the position of the United States on this important issue.**

** The complete text of the Hague Convention No. IV of 1907 is annexed to this Brief.

(b) The Interest of the Government of Panama

The Government of Panama submits this brief because the decision below dismissed with only cursory attention a series of claims by Panamanian citizens and companies gravely damaged as a consequence of actions (and inaction) by the forces of the United States on Panamanian territory in December 1989. When these forces arrived on the territory of Panama, the government assumed that they would comport themselves in full compliance with the requirements of international law. The present action (and companion actions) assert that in fact the armed forces of the United States did not live up to these requirements, and that as a result plaintiffs were seriously damaged.

The government of Panama is not prejudging the factual assertions on which the present action is based. It has a strong interest, however, in having the claims heard on the merits, and in the opportunity of its citizens to obtain justice if it is shown that their injuries were attributable to the failure of the United States armed forces to carry out their obligations under international law. The Government of Panama was confident that its citizens could secure redress in the courts of the United States for their injuries. Thus far, that confidence has not been justified. The Government of Panama therefore looks to the Supreme Court of the United States for the opportunity to have the interests of its citizens vindicated in the courts of the United States.

SUMMARY OF ARGUMENT

1. The invasion of Panama by the armed forces of the United States in December 1989 had as one of its objects the displacement of the *de facto* government of Panama. The invasion gave rise to armed conflict, as defined in international law, and in particular in the Hague Convention of 1907 Respecting the Laws and Customs of War on Land. In light of the contradictory statements in the record of this case and elsewhere, this Court should confirm that as the armed forces of the United States secured

control of Panamanian territory and displaced the Panamanian Defense Forces, the United States took on the status, and assumed the obligations, of an occupant, as defined in Articles 42 and 43 of the Regulations annexed to the Hague Convention.

2. Article 43 of the Regulations annexed to the Hague Convention provides that "the occupant [i.e., here the United States] . . . *shall* take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety. . . ." Article 3 of the Convention provides that a state party which violates the provisions of the Convention "*shall* . . . be liable to pay compensation." As Petitioners have urged, neither of these provisions leaves room for discretion. A state may avoid liability if it proves to a court that it was not "possible," or was not "in its power," to take the measures that would restore or ensure public order and safety. A state cannot avoid liability under the Convention, however, by the assertion that securing of public order was merely one of several items on its agenda, and that the order of priority in addressing these items was a matter of discretion not reviewable by a court, or by denying that it was an occupant.

3. The records of the Second Hague Peace Conference of 1907 reveal that a major motivation in the Hague Convention of 1907 was the adoption of Article III, providing for compensation (*indemnisation* in the French original) by states for violation by their armed forces of the Regulations incorporated into the Convention. Whether the obligation to pay compensation can be vindicated in national courts, as advocated by leading jurists, is not yet firmly established by case law. This Court should make clear that no state is immune from the obligations laid down by the Hague Convention, and that these obligations may be vindicated in the courts of state parties to the Convention.

ARGUMENT

I. THIS COURT SHOULD CONFIRM THAT AS THE ARMED FORCES OF THE UNITED STATES TOOK OVER CONTROL OF THE TERRITORY OF PANAMA, THE UNITED STATES BECAME AN OCCUPYING POWER WITHIN THE MEANING OF THE HAGUE CONVENTION

A. Occupation is a Question of Fact. The Fact is that the U.S. Forces Destroyed the Panamanian Security Forces and Took Control of Large Sections of Panama, Including its Capital City.

Article 42 of the Regulations Annexed to the Hague Convention of 1907 Respecting the Laws and Customs of War on Land, 36 Stat. 2277; T.S. 539; 1 Bevans 631, provides that "Territory is considered occupied when it is actually placed under the control of the hostile army." Article 42 goes on to state: "The occupation extends only to the territory where such authority has been established and can be exercised."[1] Thus, for instance, the United States became an occupant in Panama City and surrounding areas when its armed forces took control of those areas, but not in those areas of Panama where the U.S. forces made no attempt to establish their authority.

It is clear that occupation is a question of fact. There can be no doubt that as of December 21, 1989, the armed forces of the United States took control of Panama City.[2]

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[1] Note that common Article 2 of the Geneva Red Cross Conventions of 1949, 6 U.S.T. 3114, 3217, 3316, and 3516; T.I.A.S. 3362, 3363, 3364 and 3365; 75 U.N.T.S. 31, 85, 135, and 287, contains a similar provision.

[2] See, e.g., Defense Department briefing by Lt. Gen. Thomas W. Kelly, Dec. 22, 1989:

> The city is our primary concern right now. . . . Our strategy was to take on the P.D.F. units first and to take them down. We've pretty much done that. We have turned our attention to the city. We are conducting mopping up operations there, but they are not easy. . . .

New York Times Dec. 23, 1989 p. 13 col. 1.

President Bush himself confirmed this, in his Press Conference of December 21, 1989:[3]

> **Opening Statement**
>
> . . . This operation is not over, but it's pretty well wrapped up. And we've moved aggressively to neutralize the PDF [Panamian Defense Forces] to provide a stable environment for the freely elected Endara Government. . . . General Noriega is no longer in power. . . .
>
> . . .
>
> **QUESTIONS AND ANSWERS**
>
> . . .
>
> **Q.** Mr. President, in light of what you've said about the Endara Government getting started—the need for stability, the need for some kind of police action down there—we really are in a kind of an open-ended military occupation there, aren't we, sir?
>
> ***The President.*** Well, I wouldn't say it's open-ended. . . .
>
> **Q.** Mr. President, just to follow up, if I could, sir. In the planning of this operation, surely you must have recognized that these actions would be needed and some force would have to be on the ground there for a while. What estimate did you have as you undertook this operation as to how long it would take?
>
> ***The President.*** Brit, no number-of-day estimate was given to me. I think everyone recognized some of that would depend on when Noriega was brought to justice, some of that depended on how a restructured P.D.F. behaved.

There is no need here to spell out the events of December 1989. In brief, the facts were that under the re-

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[3] New York Times, Dec. 22, 1989, p. A16, col. 1-6; Public Papers of the Presidents, George Bush 1989-II, p. 1728 at 1729, 1730.

gime of General Noriega, the P.D.F. acted both as a military force and as a police force maintaining order in Panama City, Colon, and other cities of the Republic of Panama. The United States acted to destroy the P.D.F., and assumed responsibility for security in Panama on a provisional basis within the meaning of the Hague Convention. The United States did not, of course, act as a conquering power; no such condition is stated in the Hague Convention. But the United States did seek to exercise control in the territory of Panama, and it exercised that control during the period relevant to the present law suit.[4]

B. Intent, and Particularly Post Hoc Statements Cannot Change the Objective Facts Giving Rise to an Occupation.

In its brief to the District Court in this case, the U.S. Department of Justice argued that the United States did

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[4] Two weeks later, President Bush held another Press Conference:

> **Q.** Mr. President, with General Noriega out of Panama and safely in custody in this country, it seems like you may have a difficult choice in deciding how to maintain order in Panama. Do you envision keeping a U.S. military peacekeeping force there beyond the usual contingent of 12,000 troops, or would you like to see the Panamanian Forces reconstituted?
>
> ***The President:*** One, I'd like to see their police forces, whatever emerges, reconstituted. Two, we will get our forces that went in out as soon as possible. . . .
>
> . . .
>
> **Q.** Mr. President, do you anticipate that the bulk of the additional combat troops sent into Panama will indeed be out by the end of this month [January 1990] . . .?
>
> ***The President.*** . . . As soon as possible. . . Some U.S. forces that went in are already out. So I would look for an early return.
>
> **Q.** General time frame?
>
> ***The President.*** Can't help you.

N.Y. Times, Jan. 6, 1990, p. A10, col. 1-6; Public Papers of the Presidents, George Bush 1990-I, pp. 14, 16.

not assume the status of an occupant within the meaning of the Hague Convention because it did not have the intention to become an occupying power.[5] The Department of Justice relied for this assertion on an affidavit of an Assistant Secretary of State who identifies himself as "directly involved in the formulation of United States policy regarding U.S. political-military relations in Panama."[6] The affidavit states that "the territory of Panama was not placed under the authority of U.S. military forces," and concludes that therefore "the United States did not become an occupying power within the meaning of the Hague Convention No. IV. . . ." The facts, however, were otherwise, and the law is otherwise.

The drafters of the Hague Convention wanted to make sure that states did not say "We didn't mean it," or "some of our soldiers were acting beyond their orders." Even if the intention were as the Assistant Secretary stated,[7] that could not, in the submission of Panama, overcome objective facts.

Formal statements in United States documents not made in connection with this litigation, as well as statements of leading scholars in the United States and abroad, support

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[5] Memorandum of Points and Authorities on behalf of the United States in Support of Motion to Dismiss pp. 9-10, *Lindo & Maduro, S.A. v. United States of America*, Civ. Action No. 90-2589 LFO.

[6] Affidavit of Richard A. Clarke dated Jan. 10, 1991 (i.e., more than two years after the event), attached as Exhibit 3 to Memorandum of Points and Authorities, note 5 supra.

[7] Compare the briefing of General Kelly on Dec. 21, 1989, while the operation was under way:

> The Days Objectives
>
> > Our objectives for today are primarily threefold. One is to continue to support the establishment of a democratic government in Panama. Second, to move into Panama City and restore order there, where most of the disorder appears to be. And the third one is to continue to track Mr. Noriega in an effort to capture him.
>
> New York Times, Dec. 22, 1989, P. A16, col. 2.

this position. The official U.S. Department of the Army Field Manual entitled *The Law of Land Warfare*, FM27-10 (1956) states:

> Military occupation is a question of fact. It presupposes a hostile invasion, resisted or unresisted, as a result of which the invader has rendered the invaded government incapable of publicly exercising its authority, and that the invader has successfully substituted its own authority for that of the legitimate government in the territory invaded. (para. 355).
>
> . . .
>
> The exercise of these rights [of the occupying power] results from the established power of the occupant and from the necessity of maintaining law and order, indispensable both to the inhabitants and to the occupying force. (para. 358).

A leading article by a member of the U.S. Army Judge Advocate General's Corps, though recognizing the unusual circumstances of the invasion, concluded ". . . United States conduct in Operation Just Cause was regulated by the full body of international humanitarian law." John Embey Parkerson, Jr., "United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause," 133 Military L. Rev. 31, 43 (1991). Major Parkerson makes clear that by Humanitarian Law he means both the 1949 Geneva Conventions and Hague Convention IV. Id. at 44.

The Government of Panama confirms that, step by step, U.S. forces turned over control of the territory of the Republic to the present government. These good intentions, however, do not change "the facts," as Major Parkerson put it, "that United States forces exerted some degree of control over portions of Panamanian territory for periods of time. . . ." Id. at 81.[8]

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[8] Accord: *1989 Annual Report of the International Committee of the Red Cross*, p. 47:

(continued)

It is not clear that the position on the applicability of the Hague Convention taken by the U.S. Department of Justice and the Assistant Secretary of State actually represents the official position of the United States. The Government of Panama, in fulfilment of its constitutional duty to support the just claims of its citizens, joins petitioners in urging the U.S. Supreme Court to accept the present case for review, in order to clarify the position of the United States on the issue, and to provide unequivocal guidance to its forces, and to the forces of other states, in carrying out their many responsibilities around the world.

II. THE PROVISION OF THE HAGUE CONVENTION WHOSE BREACH GIVES RISE TO THE PRESENT ACTION IS MANDATORY, AND FAILURE TO CARRY OUT ITS TERMS CANNOT FAIRLY BE CHARACTERIZED AS A DISCRETIONARY ACT.

A. The Complaint in this Action Alleges Breach of a Mandatory Obligation, not Failure to Exercise a Discretionary Function

Assuming, then, that the Hague Convention of 1907 was applicable to define the obligations of the United States armed forces present in Panama in December 1989-January 1990, it is necessary to explore what those obligations entailed. The District Court dismissed the complaint in the related case (Pet. App. 20a at 22a-27a), on the basis of the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. §2680(a), and the Court of Appeals held that this conclusion was correct. (Pet. App. at 4a).

On December 20, following the United States armed intervention, the ICRC reminded both parties of the applicability of international humanitarian law and offered them its services. The regional delegate arrived in Panama the following day to assess the situation and contact the relevant authorities, in conformity with the provisions of the Third and Fourth Geneva Conventions. The US military authorities allowed the ICRC to visit prisoners of war and detained Panamanian civilians in two internment camps in the Canal zone from 30 December . . .

The Government of Panama does not, of course, claim any special expertise in interpreting the United States Federal Tort Claims Act, the construction of which has not always been wholly uniform.[9] It does, however, understand the principle that courts should not substitute their judgment for policy-making decisions of the executive branch of a state, and that even if a decision of policy proves in retrospect to have been mistaken and to have injured someone, such a mistake should not give rise to civil liability against the state. See *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797 (1984). But if the governing law or regulation is such as to leave no room for discretion, then failure to follow the law or regulation cannot be regarded as covered by an exception for discretionary action. See *Berkovitz v. United States*, 486 U.S. 531 (1988).

In the *Berkovitz* case, involving a claim that plaintiffs had contracted poliomyelitis from defective vaccines, this Court explained that the decision by the relevant government agencies on how to regulate the release of vaccine lots was a discretionary function. If the Bureau of Biologics had decided to conduct spot checks of vaccine lots, and the lot that injured the plaintiff had slipped through, there would have been no liability. *Berkovitz*, 486 U.S. at 536-38; *Varig*, 467 U.S. at 819-20. But if, as in the actual situation in *Berkovitz*, the Bureau had decided to test all vaccine lots, and plaintiff credibly asserted that a given lot was not tested at all or that the test was carelessly performed, then the Bureau (and by extension the United States) would be potentially liable for failing to carry out a duty, and therefore the United States would not be shielded from suit.

On the basis of this distinction, the decisions of the lower courts in the present case seem to have misconceived

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[9] See, e.g. Donald N. Zillman, "Congress, Courts and Government Tort Liability: Reflections on the Discretionary Function Exception to the Federal Tort Claims Act," 1989 Utah L. Rev. 687; Harold J. Krent, "Preserving Discretion Without Sacrificing Deterrence: Federal Government Liability in Tort," 39 UCLA L. Rev. 871 (1991).

the relation between the Hague Convention and the U.S. Tort Claims Act. The Court of Appeals held that the discretionary function exception applied both to the "planning" and to the "operational" level of the conduct of the U.S. armed forces, and that "even if" the Convention applied, the discretionary function exception would bar recovery. (Pet. App. at 4a). With respect, the Court of Appeals, like the District Court, appears to have conducted the analysis backwards. The proper approach, as called for by international law, would seem to be to ask first whether the applicable convention leaves the question of public order and safety to the discretion of the Occupant. If so, then how the Occupant deals with that issue is a matter of discretion or priorities or political choice, not reviewable by a court. If not, then the existence of discretion cannot arise, because the relevant provisions of the Convention contain obligations, not suggestions or options.

The present action alleges violation of Article 43 by the United States, and in particular of the obligation contained in that article that the occupant "*shall take* all the measures in [its] power to restore, and ensure, as far as possible, public order and safety. . . ." To be sure, the words "all the measures in [its] power," and "as far as possible" call for some type of evaluation. But the Convention does not say "the occupant . . . may take such measures as it deems appropriate. . . ."; it says "the occupant *shall take all the measures in its power.* . . ." and the allegation in the complaint is that the United States forces did not do so, indeed did not during several days of looting make any attempt to do so.[10]

The District Court was not asked whether it was proper for Major Smith or Sergeant Jones to lead his troops down Avenida A rather than Avenida B. That decision would clearly have been a matter of on-site discretion, and under the law of Panama as well as the law of the United States such a decision is and ought to be unreviewable in court.

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[10] See, e.g., New York Times, Dec. 23, 1989, p. A 1 col. 2-3, "CITIES ARE LOOTERS' JUNGLES AS CHAOS CONSUMES PANAMA."

The assertion in the complaint is that *no* instructions or orders were given to the U.S. forces in Panama to carry out the obligation of Article 43, so that even if Major Smith or Sergeant Jones wished to intercede to stop the looting and wanton destruction in Panama City, they would have lacked the authority to do so.[11]

If the assertion made in the complaint is true, the action (or inaction) cannot be regarded as a matter of discretion under international law as set out in the Hague Convention. Surely if United States troops had themselves engaged in pillage, notwithstanding Articles 28 and 47 of the Regulations Annexed to the Convention, which provide that pillage is forbidden, or if the United States had taken plaintiffs' property, notwithstanding Article 46, which provides "Private property cannot be confiscated," it could not be said that claims arising out of such acts would be dismissable on the basis that they arose out of exercise of a discretionary function. A fair reading of the Hague Convention leads to the conclusion that Article 43 here invoked, like Articles 28, 46, and 47 (as well as numerous others) states an obligation, not an option subject to political judgment or discretion.

B. Domestic Law Cannot Shield the United States from its International Obligations; that Law Should be So Construed as to Avoid any Conflict with the Applicable Treaty.

It is a fundamental principle of international law that a state may not invoke a domestic law to avoid an obligation under international law. See, e.g., *Advisory Opinion on Treatment of Polish Nationals in Danzig*, P.C.I.J., ser. A/B, No. 44 at 22 (1932); *Restatement (Third) of the Foreign Relations Law of the United States* §111, Comment

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[11] Note that Article I of the Hague Convention provides:

> The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention.

a; §115, Comment *b* (1987). The corollary was stated by Chief Justice Marshall about 200 years ago:

> [A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.
>
> *Murray v. Schooner Charming Betsy*
> 6 U.S. (2 Cranch) 74, 118 (1804).

The American Law Institute, linking this statement directly to international conventions, confirms that the principle of the *Charming Betsy* remains the governing principle. Section 114 of the Restatement of Foreign Relations Law (supra) provides:

> Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.

Thus to the extent the contours of the discretionary exemption to the Federal Tort Claims remain undefined,[12] the courts of the United States should so construe that domestic law as to assure compliance with the treaty obligations of the United States, not only to Panama, but to the more than 40 other state parties to the Convention.

It follows that this Court should not let stand, without the most careful consideration, a characterization of action (or inaction) by the United States as discretionary under United States law, when it is clearly non-discretionary under a treaty binding on the United States.

III. THIS COURT SHOULD UPHOLD THE RIGHT OF PRIVATE CITIZENS TO BRING PRIVATE ACTIONS FOR BREACH OF THE HAGUE CONVENTION AS CONTEMPLATED IN ARTICLE III OF THE CONVENTION.

It might be thought that the commands of the Hague Convention, including Article 43 here invoked, Article 46, prohibiting confiscation, Articles 28 and 47 prohibiting pil-

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[12] See, e.g., the Zillman and Krent articles, note 9, supra.

lage, and comparable provisions are addressed only to states, without affording rights to individual claimants. Such an interpretation of the Hague Convention, however, would be contrary to the plain meaning of Article III of the Convention as well as to the holdings of most courts that have had to deal with suits involving the Convention.

Article III of the Hague Convention provides:

> A belligerent party which violates the provisions of said Regulations shall, if the case demands, be liable to pay compensation (*indemnisation*). It shall be responsible for all acts committed by persons forming part of its armed forces.

Joseph Choate, the eminent lawyer who was selected by President Theodore Roosevelt to be chairman of the American delegation to the Second Hague Peace Conference, reported to Secretary of State Elihu Root that the addition of Article III was the major contribution of the conference to the laws of war on land, correcting the gap left by the 1899 Hague Peace Conference, which had laid down appropriate rules for the conduct of armed forces but had failed to clearly establish a requirement of compensation for breach of those rules. See *Report of Delegates to Second International Peace Conference*, [1907] Papers Relating to Foreign Relations of the United States, Vol. 2, p. 1157.[13]

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[13] Ambassador Choate wrote:

> The recent conference revised the convention of 1899, modified it in parts, and added various provisions in order to render the codification as complete and thorough, as accurate and scientific, as the changeable nature of the subject will permit.
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> . . .
>
> In one respect, however, the revised convention clearly surpasses its predecessor, for article 3 of the introduction supplies a sanction for the violation of its provisions.
>
> Id. at 1155, 1157.

Article 3 had two purposes: *First*, Article 3 made clear that states could not hide behind the argument that their forces had disobeyed orders. Liability was to be based on the principle of *respondeat superior*, and without need to prove either negligence or intent on the part of the state itself. *Second*, Article 3 sought to provide individual victims of violation of the Regulations with a cause of action against the responsible state party to the Convention. The sponsor of the amendment that became Article 3 explained the intent of the article as follows:

> It is a principle of private law that whoever, by an act contrary to law, willfully or by negligence, interferes with the rights of others, shall indemnify them for damage caused. This principle is equally applicable in the law of nations and certainly in the cases involved here. However, we cannot limit ourselves to acceptance of the theory of "subjective fault", according to which the State can be liable only if it is established that it was negligent or failed to exercise control. The most frequent case will be one in which negligence cannot be attributed to the government itself. If, in that case, the persons injured as a result of an infringement of the Regulations could not demand reparation from the government and were compelled to take proceedings against the guilty officer or soldier, they would more often than not be deprived of the right to obtain the indemnity owing to them. We believe, therefore, that, for an unlawful act by members of the armed forces contravening the Regulations responsibility lies with their government.[14]

Deuxiéme Conférence Internationale de la Paix, La Haye 15 Juin - 18 Octobre 1907, Actes et Documents, Vol. III, p. 144-145 (1909). The proposal was unanimously adopted,

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[14] Translation from French in Yves Sandoz, *Unlawful Damages in Armed Conflicts and Redress under International Humanitarian Law*, Int'l Rev. Red Cross, No. 228, 131, 137 (May-June 1982).

with both the United States and Panama in the affirmative. Id. Vol. I, p. 87, vol III, p. 627.[15]

Both contemporaneous and current commentators on the Hague Convention confirm that the drafters contemplated direct action by injured persons against the government of a state whose personnel acted contrary to the commands of the Convention. Nowhere in the records of the Second Hague Conference pertaining to Article 3 or in reports of the delegates is there any mention of state espousal of claims of injured private parties. A Belgian scholar whose work on the Hague Convention was published in 1915 explained that

> [Article 3] is justified in law, by the general principles of responsibility, applicable in the law of nations as in private law; and is justified in fact . . . [because] relief would be illusory if it could not be had against the government of the persons [violating the Hague Regulations].

Albert Mechelynck, *La Convention de la Haye concernant les lois et coutumes de la guerre sur terre d'après les Actes et documents des Conférences de Bruxelles de 1874 et de la Haye de 1899 et 1907* p. 99 (Ghent 1915).

A recent study by an eminent Dutch scholar reached the same conclusion:

> [Article 3] is unmistakably designed to enable these people [private claimants] to present their bills directly to the State, i.e. to its competent (military or other) authorities either during or after the war.

Frits Kalshoven, "State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention

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[15] A number of states voted yes with reservations; neither the United States nor Panama made any reservation to its support for Article 3.

IV of 1907 to Article 91 of Additional Protocol of 1977 and Beyond," 40 Int'l & Comp. L.Q. 827, 835-36 (1991).[16]

While no case has been reported exactly on all fours with the present action, a number of cases in other countries have upheld private claims depending on the Hague Convention No. IV and breach of the annexed Regulation. See, e.g., *Bilotte v. Groos and the State of the Netherlands*, Dist. Ct. Arnhem, the Netherlands, June 24, 1948, [1951] Nederlandse Jurisprudentie No. 261, [1949] Ann'l Digest and Reports of Int'l Law Cases 493; *Johansen v. Gross*, [1950] Norsk Rettstidende p. 326 (Norway), [1949] Ann'l Digest 481; *P. v. A.G. K. and P.*, (Fed'l (Supreme) Ct. Switzerland), [1948] Ann'l Digest 594; *Dawson Bank Ltd. v. Ko Sin Sein* Burma, High Court Burma, Sept. 15, 1960, Chief Court May 8, 1963, 36 Int'l L. Rep. 497. Perhaps the closest case to the present one came before the Supreme Court of France in 1934, arising out of the occupation by France of territory then under German sovereignty, and requisition there of a saw mill belonging to plaintiff. *Havé v. State of France*, [1935] 1 Sirey 249 (Cour de Cassation, Ch. civ., 6 Feb. 1934), summarized in [1933-34] Ann'l Digest & Reports of Public Int'l Law Cases 511. France, the occupying power, had tendered compensation to plaintiff for the property seized by its military forces, but plaintiff considered the compensation inadequate within the meaning of the Regulations annexed to the Hague Convention. The former owner brought suit against the State of France in an ordinary civil court; plaintiff did not prevail on the merits, but no challenge was raised or even doubt expressed as to his standing to assert his claim for violation of the Hague Convention directly against the oc-

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[16] Professor Kalshoven, Professor of International Humanitarian Law in Leiden University, goes on to contrast the intent of the drafters with state practice under Article 3, and concludes that state practice has proved disappointing, resulting "in its original meaning and purpose receding into the background." Id. at 836-37. The present case offers an opportunity to restore Article 3 to its original meaning and purpose.

cupying power.[17] No case in any country has come to the attention of the Government of Panama or its counsel (other than the decisions in the present and related actions) rejecting a private claim involving the protection of the Hague Convention on the ground that the Convention does not create a cause of action.[18]

Of course not every state has provision in its domestic law for suits against the government. When a state has such a law, as the United States does, it would seem entirely appropriate for its courts to entertain claims under such a law, to demonstrate to the world community that the United States continues in the forefront of respect for international law.

This Court wrote about the Hague Convention 46 years ago:

> We do not make the laws of war, but we respect them so far as they do not conflict with the commands of Congress or the Constitution.

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[17] In a comment to the published report of the case, Professor Charles Rousseau emphasized that the fundamental principle, upheld in the case, was the principle of compensation ("indemnisation") as set down in the Convention. Id. at 251.

[18] The only court to so hold was the Court of Appeals for the Fourth Circuit in one of the cases related to the present case, *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir. 1992). The court there stated:

> International treaties are not presumed to create rights that are privately enforceable. . . . Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action. . . . The Hague Convention does not explicitly provide for a privately enforceable cause of action. Moreover, we find that a reasonable reading of the treaty as a whole does not lead to the conclusion that the signatories intended to provide such a right.

As demonstrated by the sources cited above, this conclusion reflects a misreading or misunderstanding of the Hague Convention, and should not be permitted to stand unreviewed by this Court.

In re Yamashita, 327 US 1, 16 (1946). There is surely no conflict between any command of Congress or the United States Constitution and assertion in U.S. courts of claims by citizens of Panama under the Hague Convention. At minimum, this Court should grant review of the summary disposition of this and companion cases by the lower U.S. courts, so that the issues here only touched upon may receive thorough exploration.

CONCLUSION

The late Judge Richard R. Baxter, the United States member of the International Court of Justice, wrote that "[t]he first line of defense against international humanitarian law is to deny that it applies at all."[19] The effect of the dismissal of the present cases on the basis of the discretionary function exception to the Federal Tort Claims Act or a misreading of the Hague Convention is a denial that the obligation to secure public order and safety exists at all. This Court should not permit such denial to stand unreviewed and unexamined.

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted

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[19] Richard R. Baxter, "Some Existing Problems of Humanitarian Law," in The Concept of International Armed Conflict: Further Outlook, p. 1 at 2 ((Brussels 1974).

APPENDIX

APPENDIX

Hague Convention No. IV
Respecting the Laws and Customs of War on Land

18 October 1907

(36 Stat. 2277; Treaty Series No. 539; 1 Bevans 631.

[Here follows the list of Sovereigns and Heads of State who sent Plenipotentiaries to the Conference.]

Considering that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where an appeal to arms may be brought about by events which their solicitude could not avert;

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;

Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible;

Have deemed it necessary to complete and render more precise in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, so far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

It has not, however, been found possible at present to concert Regulations covering all the circumstances which arise in practice;

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.

They declare that it is in this sense especially that Articles 1 and 2 of the regulations adopted must be understood.

The High Contracting Parties, wishing to conclude a fresh Convention to this effect, have appointed the following as their Plenipotentiaries:

[Here follow the names of the Plenipotentiaries.]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following:

ARTICLE 1.

The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention.

ARTICLE 2.

The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not

apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

ARTICLE 3.

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

ARTICLE 4.

The present Convention, duly ratified, shall replace as between the Contracting Powers, the Convention of the 29th July, 1899, respecting the Laws and Customs of War on Land.

The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.

ARTICLE 5.

The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

The first deposit of ratifications shall be recorded in a *procès-verbal* signed by the Representatives of the Powers which take part therein and by the Netherland Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherland Government and accompanied by the instrument of ratification.

A duly certified copy of the *procès-verbal* relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, as well as of the instruments

of ratification, shall be immediately sent by the Netherland Government, through the diplomatic channel, to the Powers invited to the Second Peace Conference, as well as to the other Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph the said Government shall at the same time inform them of the date on which it received the notification.

ARTICLE 6.

Non-Signatory Powers may adhere to the present Convention.

The Power which desires to adhere notifies in writing its intention to the Netherland Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

This Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

ARTICLE 7.

The present Convention shall come into force, in the case of the Powers which were parties to the first deposit of ratifications, sixty days after the date of the *procès-verbal* of this deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherland Government.

ARTICLE 8.

In the event of one of the Contracting Powers wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherland Government, which shall at once communicate a duly certified copy of the notification to all the other Powers, informing them of the date on which it was received.

The denunciation shall only have effect in regard to the notifying power, and one year after the notification has reached the Netherland Government.

ARTICLE 9.

A register kept by the Netherland Ministry for Foreign Affairs shall give the date of the deposit of ratifications made in virtue of Article 5, paragraphs 3 an 4, as well as the date on which the notifications of adhesion (Article 6, paragraph 2) or of denunciation (Article 8, paragraph 1) were received.

Each Contracting Power is entitled to have access to this register and to be supplied with duly certified extracts.

In faith of which the Plenipotentiaries have appended their signatures to the present Convention.

Done at The Hague, the 18th October, 1907, in a single original, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the Powers which have been invited to the Second Peace Conference.

[Here follow signatures.]

ANNEX TO THE CONVENTION. REGULATIONS RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND

SECTION I. ON BELLIGERENTS.

CHAPTER I. The Qualifications of Belligerents.

ARTICLE 1.

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;

2. To have a fixed distinctive emblem recognizable at a distance;

3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

ARTICLE 2.

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war

ARTICLE 3.

The armed forces of the belligerent parties may consist of combatants and noncombatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.

CHAPTER II. Prisoners of War.

ARTICLE 4.

Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them.

They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

ARTICLE 5.

Prisoners of war may be interned in a town, fortress, camp, or other place, under obligation not to go beyond certain fixed limits; but they can only be placed in confinement as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

ARTICLE 6.

The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State is paid at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.

ARTICLE 7.

The Government into whose hands prisoners of war have fallen is charged with their maintenance.

In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing on the same footing as the troops of the Government who captured them.

ARTICLE 8.

Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are. Any act of insubordination justifies the adoption towards them of such measures of severity as may be considered necessary.

Escaped prisoners who are retaken before being able to rejoin their own army or before leaving the territory occupied by the army which captured them are liable to disciplinary punishment.

Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight.

ARTICLE 9.

Every prisoner of war is bound to give, if he is questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to have curtailment of the advantages accorded to prisoners of his class.

ARTICLE 10.

Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honour, scrupulously to fulfil, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

In such cases their own Government is bound neither to require of nor accept from them any service incompatible with the parole given.

ARTICLE 11.

A prisoner of war can not be compelled to accept his liberty on parole; similarly the hostile Government is not

obliged to accede to the request of the prisoner to be set at liberty on parole.

ARTICLE 12.

Prisoners of war liberated on parole and recaptured bearing arms against the Government to whom they had pledged their honour, or against the allies of that Government, forfeit their right to be treated as prisoners of war, and can be brought before the Courts.

ARTICLE 13.

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy's hands and whom the latter thinks fit to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.

ARTICLE 14.

An information bureau for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. The function of this bureau is to reply to all inquiries about the prisoners, to receive from the various services concerned all the information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The bureau must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special charter. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.

It is likewise the function of the information bureau to receive and collect all objects of personal use, valuables, letters, etc., found on the field of battle or left by prisoners who have been released on parole, or exchanged, or who have escaped, or died in hospitals or ambulances, and to forward them to those concerned.

ARTICLE 15.

Relief societies for prisoners of war, which are properly constituted in accordance with the laws of their country and with the object of serving as the channel for charitable effort shall receive from the belligerents, for themselves and their duly accredited agents every facility for the efficient performance of their humane task within the bounds imposed by military necessities and administrative regulations. Agents of these societies may be admitted to the places of internment for the purpose of distributing relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an undertaking in writing to comply with all measures of order and police which the latter may issue.

ARTICLE 16.

Information bureaus enjoy the privilege of free postage. Letters, money orders, and valuables, as well as parcels by post, intended for prisoners of war, or dispatched by them, shall be exempt from all postal duties in the countries of origin and destination, as well as in the countries they pass through.

Presents and relief in kind for prisoners of war shall be admitted free of all import or other duties, as well as of payments for carriage by the State railways.

ARTICLE 17.

Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where

they are detained, the amount to be ultimately refunded by their own Government.

Article 18.

Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever Church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities.

Article 19.

The wills of prisoners of war are received or drawn up in the same way as for soldiers of the national army.

The same rules shall be observed regarding death certificates as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

Article 20.

After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.

Chapter III. The Sick and Wounded.

Article 21.

The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention.

Section II. Hostilities.

Chapter I. Means of Injuring the Enemy, Sieges, and Bombardments.

Article 22.

The right of belligerents to adopt means of injuring the enemy is not unlimited.

ARTICLE 23.

In addition to the prohibitions provided by special Conventions, it is especially forbidden—

a. To employ poison or poisoned weapons;

b. To kill or wound treacherously individuals belonging to the hostile nation or army.

c. To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion;

d. To declare that no quarter will be given;

e. To employ arms, projectiles, or material calculated to cause unnecessary suffering;

f. To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;

g. To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

h. To declare abolished, suspended, or inadmissible in a Court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

ARTICLE 24.

Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

Article 25.

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

Article 26.

The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

Article 27.

In sieges and bombardments all necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

Article 28.

The pillage of a town or place, even when taken by assault, is prohibited.

Chapter II. Spies.

Article 29.

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for

the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

Article 30.

A spy taken in the act shall not be punished without previous trial.

Article 31.

A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

Chapter III. Parlementaires.

Article 32.

A person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag. He has a right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and interpreter who may accompany him.

Article 33.

The commander to whom a parlementaire is sent is not in all cases obliged to receive him.

He may take all the necessary steps to prevent the parlementaire taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the parlementaire temporarily.

Article 34.

The parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treachery.

Chapter IV. Capitulations.

Article 35.

Capitulations agreed upon between the contracting parties must take into account the rules of military honour.

Once settled, they must be scrupulously observed by both parties.

Chapter V. Armistices.

Article 36.

An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

Article 37.

An armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

Article 38.

An armistice must be notified officially and in good time to the competent authorities and to the troops. Hostilities

are suspended immediately after the notification, or on the date fixed.

Article 39.

It rests with the contracting parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the inhabitants and between the inhabitants of one belligerent State and those of the other.

Article 40.

Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

Article 41.

A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary; compensation for the losses sustained.

Section III Military Authority Over the Territory of the Hostile State.

Article 42.

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43.

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as

far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

ARTICLE 44.

A belligerent is forbidden to force the inhabitants of occupied territory to furnish information about the army of the other belligerent, or about its means of defence.

ARTICLE 45.

It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

ARTICLE 46.

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

ARTICLE 47.

Pillage is formally forbidden.

ARTICLE 48.

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.

ARTICLE 49.

If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the

occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

ARTICLE 50.

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

ARTICLE 51.

No contribution shall be collected except under a written order, and on the responsibility of a Commander-in-chief.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors.

ARTICLE 52.

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in operations of the war against their country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

ARTICLE 53.

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the prop-

erty of the State, depôts of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for operations of the war.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depôts of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

ARTICLE 54.

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

ARTICLE 55.

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

ARTICLE 56.

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.